Supreme Court, U. S.
FILED
JAN 27 1975
MICHAEL RODAK, JR., CLERK

No. 74-928

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

NATHAN GEORGE DINITZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, pp. 1a-25a) is reported at 492 F. 2d 53. The *per curiam* opinion of the court of appeals *en banc* (App. B, *infra*, pp. 26a-28a) is reported at

504 F. 2d 854. The opinion of the district court (App. D, *infra*, pp. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals *en banc* (App. C, *infra*, pp. 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including January 26, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who has moved for and been granted a mistrial may prevent renewed prosecution on the ground that an unintentional error committed by the court at trial rendered his motion involuntary and that the court's granting of his motion did not satisfy the manifest necessity test.

2. Whether a court's declaration of a mistrial, manifestly necessary when made, may nevertheless bar renewed prosecution because the error creating the need for the mistrial was not itself manifestly necessary.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

STATEMENT

1. In an indictment returned on December 6, 1972, in the United States District Court for the Northern District of Florida, respondent Nathan George Dinitz was charged with having conspired to distribute a Schedule I controlled substance (LSD), in violation of 21 U.S.C. 846, and with having distributed such substance, in violation of 21 U.S.C. 841(a)(1). Respondent initially retained Jeffrey Meldon to represent him. Meldon appeared with respondent at the arraignment and subsequently filed several pretrial motions. Approximately five days before trial, respondent retained Maurice Wagner as his trial counsel, although Meldon continued to do "investigation into the case" (Tr. 98).[1] Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the day of trial the court allowed him to appear *pro haec vice* on respondent's behalf. Meldon was also present as counsel of record at trial, as was Fletcher Baldwin, a professor of law at the University of Florida. Wagner advised the court at the beginning of trial that Baldwin would "make the arguments with regard to the law and I [Wagner] will try the facts * * *" (Tr. 45).

After the jury had been sworn and the government had made its opening statement, Wagner began his

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[1] Transcript references ("Tr.") are to the transcript of the proceedings held in the United States District Court for the Northern District of Florida on February 15-16, 1973, which ended in a mistrial.

opening statement for respondent. Since the government's case on both counts depended largely upon the testimony of undercover agent Steve Cox concerning the circumstances of his purchase of LSD from respondent, Wagner's trial strategy was to attack Cox's credibility. Wagner attempted to implement this strategy by suggesting at the outset of the trial that respondent had been "set up" by the sale to Cox for a subsequent extortion attempt. Wagner apparently hoped that the jury would infer from this suggestion either that Cox was the extortionist or that he had played some part in the extortion scheme (Tr. 105-106).[2]

After introducing himself and his co-counsel to the jury, Wagner initiated the following challenge to Cox's credibility (Tr. 72):

> Mr. Wagner: * * * After working on this case over a period of time it appeared to me that if we would have given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—

[2] Approximately one week after his arrest, respondent had reported to the Federal Bureau of Investigation that he had received a telephone call from someone offering to arrange for all charges arising from the sale to Cox to be dropped if respondent would pay the caller a sum of money. With the Bureau's cooperation, an envelope was filled with paper and placed at the appointed pick-up spot. A man was observed picking up the envelope, but the Bureau was unable to apprehend him—although it was able to confirm that the man bore no resemblance to Cox (Tr. 106). No evidence linking Cox to the attempted extortion was ever developed.

> Mr. Reed [Asst. U.S. Attorney]: Your Honor, we object to personal opinions.
>
> The Court: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions.
>
> Mr. Wagner: Thank you, Your Honor. I call this the Case of the Incredible Witness.

The government again objected. The court sustained the objection, had the jury removed and admonished Wagner (Tr. 72-74).[3]

At a later point in his opening statement, Wagner renewed his attack on Cox. The court again had the jury removed and warned Wagner a second time (Tr. 76-77). After the jury had returned, Wagner began to recite what the evidence would show up to the time of respondent's indictment and arrest. He quickly returned to the suggestion that Cox had been involved in an attempted extortion, however, stating that "[s]ome week or ten days later Nat [Dinitz] began to get telephone calls offering—" (Tr. 87). At the government's request, the jury was once more removed and the court pressed Wagner for evidence of some connection between the extortion attempt and Cox. When Wagner was unable to offer any such evidence, the trial judge ordered him to leave the courtroom (Tr. 87-95).

After Wagner had left the courtroom and Meldon had disclaimed any responsibility for the substance

[3] Wagner had also annoyed the court at the pretrial suppression hearing by unduly prolonging his argument in support of a motion to suppress that the court considered "obviously frivolous" (Tr. 74).

of Wagner's opening remarks (Tr. 95-98), the judge asked Meldon whether he was prepared to assume the lead in trying the case. Meldon responded that he was not, since he had not discussed the case with any of the witnesses or otherwise prepared for trial. He further stated that he was reluctant to proceed in the face of respondent's desire to have the case tried by Wagner. The judge thereupon recessed the trial until the following morning, instructed Meldon to prepare himself to proceed at that time, and indicated that he would consider the entire matter overnight (Tr. 98-101).

In chambers the following morning, Meldon again stated that respondent did not want him to try the case and that he felt that he "would not be able to give [respondent] a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening remarks * * *" (Tr. 103). The judge reviewed the events of the preceding day and noted that an unusually large number of persons, including members of the news media, had appeared for the trial and that he was concerned that the interest of many of those persons was attributable to a local news story to the effect that when the case was tried "there was going to be a shocking matter that the public would hear of." The judge stated that he could only assume that the "matter" referred to in the local media was the alleged extortion attempt directed at respondent (Tr. 107).

The judge also set forth some of the alternatives available to respondent and to the court (Tr. 105) and stated that because of Wagner's misconduct and the inferences the jury might draw from Wagner's absence from the trial, he was "seriously considering granting a mistrial * * *" (Tr. 107). The judge requested that counsel for respondent consider the available alternatives with respondent and advise the court of respondent's wishes. He also suggested that the government consider the advisability of consenting to the declaration of a mistrial and of retrial at a later date "when there is a possibility that this widespread publicity would not permeate the atmosphere" (Tr. 108).

Following a short recess, Meldon moved for the declaration of a mistrial on respondent's behalf. Respondent's position was explained to the court as follows (Tr. 109):

> Mr. Meldon: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

The government did not oppose respondent's motion, and the court announced (Tr. 110):

> Then I am going to declare a mistrial, gentlemen. I think that under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Prior to his second trial, respondent moved to dismiss the indictment on the ground of double jeopardy and, alternatively, to have Wagner permitted to reenter the case. Both motions were denied by the trial court (App. D, *infra*, pp. 31a-37a). Respondent, a third-year law student, proceeded at his second trial *pro se* and was convicted on both counts contained in the indictment.

2. A divided panel of the court of appeals reversed respondent's conviction (App. A, *infra*, pp. 1a-25a). After granting the government's motion for rehearing *en banc*, the full court affirmed the panel's decision in a brief *per curiam* opinion, seven judges dissenting (App. B, *infra*, pp. 26a-28a).

According to the two judges who comprised the majority of the panel, respondent's claim that his retrial was barred by the Double Jeopardy Clause involved two relatively distinct issues: first, the "threshold" issue whether respondent's motion for a mistrial was voluntarily made; and, second, if it was not voluntarily made, whether the court's declaration of a mistrial was justified by "manifest necessity." With respect to the first issue, the panel held that the actions of the trial judge in banishing Wagner and threatening to take disciplinary action against Meldon (Tr. 95-98), coupled with Meldon's lack of preparation and respondent's refusal to be represented by him, gave respondent "no choice but to move for or accept a mistrial. Under the circumstances of this case * * * [respondent] can hardly be said to have relinquished voluntarily his right to

proceed before the first jury" (App. A, *infra*, pp. 13a-14a).[*]

Turning to the second issue, the panel pointed out (*id.* at 12a):

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial.

On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Instead, because the "die was cast with the trial judge's response to the conduct of defense counsel," the panel held that appellate review was appropriately focused on Wagner's expulsion rather than on the subsequent declaration of a mistrial (*ibid.*). The panel then con-

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[*] In support of this holding, the panel quoted from *United States* v. *Walden*, 448 F. 2d 925 (C.A. 4). In *Walden*, the Fourth Circuit panel had held that the consent of several of the defendants to the declaration of a mistrial had in effect been coerced by the trial judge and that termination of the trial by the judge on his own motion had not been justified by manifest necessity. Prior to the *en banc* decision in the present case, however, the panel's decision in *Walden* was superseded by an order of the Fourth Circuit *en banc* (458 F. 2d 36), affirming by an evenly-divided court the decision of the district court that manifest necessity for the mistrial had existed. The full court in *Walden* did not reach, therefore, the issue of consent. Petitions for writs of certiorari were denied *sub nom. Cook* v. *United States*, 410 U.S. 969 and *sub nom. Ard, et al.* v. *United States*, 409 U.S. 867, respectively.

cluded that means of dealing with Wagner's misconduct short of excluding him from the trial had been available to the trial judge and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, the action of the trial judge in excluding Wagner—when measured by the "manifest necessity" test—constituted an abuse of judicial discretion and barred renewed prosecution of respondent.

The dissenting member of the panel assumed for purposes of argument that the trial judge had erred in excluding respondent's counsel. But he rejected as mistaken in light of decisions of this Court and, in any event, as "too extreme to be workable," the majority's view that that "error" and the trial judge's granting of respondent's motion for a mistrial operated to bar respondent's subsequent trial (App. A, *infra*, p. 24a). The test mandated by the decisions of this Court, in the judgment of the dissenting member, was whether the expulsion of Wagner constituted judicial overreaching—not whether it was an abuse of discretion.[5] And just as the majority had expressly declined to "characterize the trial judge's actions as judicial overreaching" (*id.* at 13a), so the dissenting member found no evidence of judicial impropriety (*id.* at 23a). The dissent concluded that, by presenting trial judges with the

[5] This Court has stated that such overreaching would exist "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal * * *." *United States* v. *Jorn*, 400 U.S. 470, 485 n. 12.

specter of the bar of double jeopardy for errors not attributable to overreaching, the panel's decision would "give rise to much reluctance in granting mistrials" (*id.* at 24a).

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the law of double jeopardy that are of great importance to the administration of criminal justice. In affirming the panel's decision in this case, the majority of the court of appeals *en banc* held (App. B, *infra*, p. 26a):

> [A] defendant's motion for mistrial does not remove the bar to reprosecution when the formal mistrial motion by defendant is solely caused by an abuse of judicial discretion, which though not intended to avoid an acquittal, is so damaging to the defendant that he cannot proceed with his case and submit it to the jury then empaneled.

The court thus departed from the "judicial overreaching" standard applied by this Court when a mistrial flows from a defense motion (see *United States* v. *Jorn*, 400 U.S. 470, 485) and substituted in its stead the "manifest necessity" standard applied when the trial court acts *sua sponte* (see *Illinois* v. *Somerville*, 410 U.S. 458). We submit that this departure is without a predicate in decisions of this Court or support in public policy—particularly in a case such as the present, in which neither the judicial "error" complained of nor any other action by the court may properly be said to have "coerced" respondent into moving for a mistrial.

In addition to employing an incorrect standard in measuring the propriety of the mistrial declared pursuant to respondent's motion, the decision below gravely distorts the standard evolved by this Court for assaying the propriety of a mistrial declared by the trial court on its own motion. *E.g.*, *Illinois* v. *Somerville*, *supra*. The court of appeals applied the test of "manifest necessity" not to the *effects* of trial error, irrespective of its source, but to the *cause* of such error. It is difficult to conceive of a test more destructive of " 'the public's interest in fair trials designed to end in just judgments' " (410 U.S. at 470; quoting from *Wade* v. *Hunter*, 336 U.S. 684, 688-689) than a test which thus focuses on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered.

While the court of appeals sought to limit its holding to the "extraordinary circumstances" of this case (App. B, *infra*, p. 27a), we are convinced that the instant circumstances are far from "extraordinary" and that the court's holding will spawn confusion and unwarranted results in a great number of future cases. We further believe that the inevitable effect of the majority decisions in this case is seriously to impair the utility of a procedural device—the mistrial—designed as much "for the more effective protection of the criminal accused," *Gori* v. *United States*, 367 U.S. 364, 370, as for the benefit of society. Rather than be told by an appellate court that an error on its part—made "in the immediate exigencies of

trial" (*ibid.*)—precludes retrial, many trial judges faced with this decision can be expected to adopt the safer course of routinely denying defense motions for a mistrial even in the wake of clear error precluding a fair consummation of the trial.

1. In *United States* v. *Jorn*, 400 U.S. 470, 485, this Court stated that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." As noted earlier, the majority of the panel and of the full court found that the mistrial in this case was made necessary by judicial error—not by judicial overreaching. That the trial judge ultimately chose to grant respondent's motion for a mistrial as the least drastic remedy for that "error" was entirely proper under *Jorn*. Respondent, like any defendant aggrieved by the occurrence of error during trial, faced a concededly difficult choice between the risk of conviction and affirmance on appeal and the relinquishment of the right to have his case determined by the jury then impaneled.[6] In making that choice he was assisted by two retained attorneys. The decision

[6] In the circumstances of this case, in which the first witness had yet to be called, respondent was as a practical matter relinquishing very little of value. The trial to that point was going neither well nor badly, and the next jury was as likely to be favorably disposed toward his defense as the one then impaneled.

reached was involuntary only in the sense that he could not be certain that the trial judge (or an appellate court) would agree subsequently that the trial had been infected with reversible error. Consequently, if he felt he had been prejudiced by the court's action he may have been well advised to move for a mistrial. Respondent exercised, therefore, not a "Hobson's choice" (App. A, *infra*, p. 13a) but the right to move to abort his original trial in the face of perceived prejudice.

2. But even assuming that the trial court's action compelled respondent's motion for a mistrial and was tantamount to a *sua sponte* declaration of a mistrial by the court, respondent's retrial would still be permissible under the teaching of *Illinois* v. *Somerville*, *supra*. The majority of the court of appeals, sitting *en banc*, held that the effect of the trial court's action in excluding Wagner was to deprive respondent "of effective assistance of counsel[,] thereby making further conduct of the trial impossible" (App. B, *infra*, p. 27a). We perceive no substantive distinction, so far as the policies subsumed in the Double Jeopardy Clause are concerned, between an error that is "so damaging to the defendant" that he concludes that "he cannot proceed with his case" (*id.* at 26a) and an unintentional error that carries with it the certainty of reversal on appeal. In either case, continuation of the trial, while physically possible, would be a futile and wasteful course of action. And in either case, therefore, the law empowers the trial

judge—irrespective of the source of the error—to abort the trial on his own motion. Thus, even applying the reasoning of the majority opinions below, what this Court said in *Somerville* has equal application here (410 U.S. at 464):

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Accordingly, in ruling that respondent's reprosecution was barred by double jeopardy, the court of appeals sanctioned a fundamental departure from this Court's decision in *Somerville*. See also *Simmons* v. *United States*, 142 U.S. 148; *United States* v. *Perez*, 9 Wheat. 579.

3. The effect of the court of appeals' decision in this case is to erase any meaningful distinction in the law of double jeopardy between unintentional and intentional errors occurring at trial insofar as those errors are not directly chargeable to the defendant and figure significantly in the defendant's decision to move for a mistrial. Underlying the elimination of this distinction is the premise that trial judges and prosecutors may, without an unduly adverse impact upon the administration of criminal justice, be held to standards of flawless conduct that might be expected of someone acting with the benefit of hindsight. The fallacy of this premise is amply demonstrated by the facts of this case.

As pointed out in Judge Bell's dissenting opinion, there is strong support in the record for the trial judge's conclusion that respondent's trial counsel was bent upon a conscious course of baiting the court with the intent to trigger a mistrial (App. A, *infra*, p. 23a). Within a period of only a few minutes, the trial judge was compelled to excuse the jury three times in order to admonish counsel. Despite repeated warnings, however, respondent's counsel persisted in the very conduct for which he had been admonished. Most significantly, he continued to attempt to imply in the jury's presence—without any evidentiary support whatever—that the principal prosecution witness had been involved somehow in an extortion attempt directed at respondent.[7]

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[7] In explaining the considerations that had motivated him to grant respondent's motion for a mistrial, the trial judge noted in his Order of March 26, 1973 (App. D, *infra*, p. 33a):

> a) The demeanor of counsel Wagner and the impression he conveyed to the jury made it impossible for the government to get a fair trial: Counsel Wagner stated to the jury that the arrest of the defendant was but an "afterthought" by the government when counsel knew that the defendant had been indicted for a substantial period of time prior to the arrest. Then characterizing his next line of remarks as "the unusual circumstances" surrounding the prosecution of defendant, counsel Wagner placed before the jury information regarding certain telephone calls which the defendant had received, Wagner then intending to tell the jury of an extortion attempt against defendant which he [Wagner] was prepared to argue to the jury involved the government agent * * *.

It should also be noted that, in commenting upon the trial judge's decision to exclude respondent's trial counsel, at least

Even if it is conceded for purposes of argument that the trial judge's decision to exclude respondent's trial counsel was error, however, the decision of the court of appeals would place yet a further burden on trial judges—that is, the burden of correctly anticipating the response of defendants to action by the court. In this case, when the trial judge removed respondent's trial counsel he had no reason to believe (a) that Meldon, who had represented respondent vigorously from the beginning and had remained co-counsel of record, was unprepared to assume the lead in conducting the defense or (b) that respondent would refuse to be represented at trial by Meldon. It was only after respondent's trial counsel had left the courtroom that the court became aware of these problems.

It may be argued that the high price from the public's standpoint placed by the decision below upon errors occurring at trial not chargeable to the defendant will encourage trial judges (and prosecutors) to proceed more circumspectly before acting in ways that make declaration of a mistrial "inevitable." We submit that that is a highly improbable proposition. The more likely result, it seems, is that noted in the dissenting opinion below (App. A, *infra*, p. 24a):

> The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks

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one of respondent's other attorneys concluded "[a]fter a full night's research * * * that the Court's action was proper * * *" (Tr. 104).

the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2109.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

April 4, 1974

Appeal from the United States District Court for the Northern District of Florida.

Before BELL, DYER and CLARK, Circuit Judges.

CLARK, Circuit Judge:

I.

Nathan George Dinitz was convicted of violating 21 U.S.C. § 846 by conspiring to distribute a schedule I controlled substance (LSD) and of violating 21 U.S.C. § 841(a)(1) by distributing LSD. Dinitz's first trial ended in a mistrial. He contends that retrying him violated his fifth amendment rights against double jeopardy. Because we agree that the retrial constituted double jeopardy, we do not reach any of the other arguments Dinitz advances.

Like almost all mistrial-double jeopardy cases this one turns on the facts of its particular procedural context. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). Dinitz was charged

with participating in a sale of LSD to Steve Cox, a government informer. He initially employed Attorney Jeffrey Meldon to represent him. Meldon appeared with him at arraignment and filed numerous pretrial motions. Approximately five days before Dinitz's trial, Attorney Maurice Wagner was hired to act as lead counsel and conduct the trial. Wagner had not been admitted to practice before the Northern District of Florida, but the court allowed him to appear *pro haec vice* in Dinitz's case. Meldon was also present at trial along with a professor of law from the University of Florida,[1] as counsel for Dinitz. After the jury had been sworn and the government had made its opening statement, Wagner began an opening statement in behalf of Dinitz. The crux of the government's case on both counts was to be the testimony of agent Cox as to the circumstances of his purchase from Dinitz. Wagner's trial strategy was to attack the credibility of Cox, and a part of this strategy was to put before the jury at the outset the idea that Dinitz had been "set up" with the sale to Cox as a predicate for a subsequent extortion attempt. Wagner intended to offer proof that a week after his arrest Dinitz had received a phone call from someone who offered to arrange for all charges to be dropped if Dinitz would pay over a certain amount of money. Obviously Wagner hoped the jury

[1] The professor, Fletcher Baldwin, advised the court at the outset of the proceedings that he was not a trial attorney and would not actually participate in Dinitz's trial. He did brief and argue the instant appeal.

would infer from this evidence either that Cox was the extortionist or that he had some part in the scheme. Ample proof of the attempt at extortion was known to be available to the defense but, as it subsequently developed, no connection between Cox and the extortion attempt could ever be demonstrated.[2] In the early part of his opening statement, Wagner started an attack obviously aimed at Cox.

> Mr. Wagner: After working on this case over a period of time it appeared to me that if we would have given nonmenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it the case—
>
> Mr. Reed: Your honor, we object to personal opinions. (Asst. U.S. Attorney)
>
> The Court: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions.
>
> Mr. Wagner: Thank you, your honor. I call this the case of the incredible witness.

The jury, then, was removed from the courtroom and the court warned Wagner in the following terms:

[2] Dinitz had promptly reported the extortion attempt to the Federal Bureau of Investigation and, at the suggestion of the FBI, an envelope was filled with paper and placed underneath a large trash container at the supposed pick-up spot. Johnson, an FBI agent, in an attempt to catch the extortionist kept the trash container under surveillance and reported that he saw someone pick up the envelope but was unable to apprehend the pick-up man. However, Johnson was able to describe the physical appearance of the man picking up the envelope and the subject did not in any way resemble Cox.

> The Court: You appeared at this trial late, you showed up, you were not counsel of record, you have never filed an appearance. This court was not aware of your participation until the jury was to be selected. I do not approve of your behavior and if you attempt to bait this court once again I am going to refuse to allow you to practice law in this court again.

Wagner then continued with his opening statement, bringing his chronological recitation of what the evidence would show up to the time of the indictment. At that point he began this statement: "some week or ten days later Nat [Dinitz] began to get telephone calls offering—." The government's objection again caused the jury to be removed from the courtroom. In the jury's absence the court asked Wagner what he was about to discuss. He responded that he was going to discuss the extortion attempt against Dinitz. The court demanded that he demonstrate that he had proof that Cox was the man who picked up the parcel at the trash container. When it became apparent that the defense had no such proof, the following exchange transpired (still in the absence of the jury):

> The Court: You will leave this courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now. Mr. Marshal, see that he leaves the building immediately. . . . [Wagner departs]. This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination, and I hope Mr. Meldon that you are not responsible for any part of it. I will ask you now if you are. Did you discuss with Mr. Wagner what his opening statement was going to consist of and the evidence that he was going to attempt to put before this jury with respect to those phone calls and extortion attempts?
>
> Mr. Meldon: Your honor, I did not prepare the opening statement, and Mr. Wagner prepared his opening statement independently.
>
> The Court: This is the worst exhibition I have seen. I am going to inquire of you further as to your knowledge of what Mr. Wagner was attempting to do. Mr. Wagner knew without doubt that this was inadmissible, highly prejudicial and nothing but character assassination, and I am going to inquire of you further, and if I find that you had anything to do with it I am going to take further action in your regard, too.

After the Assistant U. S. Attorney interjected that Meldon might well have been aware in advance of Wagner's intended trial tactics, the court continued to address Meldon as follows:

> The Court: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently, you called him in to be associated with you. Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner.

Meldon thereupon denied ever telling Wagner that Cox was the extortionist and disclaimed any responsibility for Wagner's planned opening statement. The court then inquired of Meldon if he was prepared to

proceed at that time, whereupon the following exchanges occurred:

> Mr. Meldon: The Defendant had stated to me that since I was not hired to argue the case he is in a quandary because he hired Mr. Wagner to argue the case and he feels he needs more time to obtain outside counsel to argue the case for him.
>
> The Court: That comes too late. You are his counsel and have been. I will consider it between now and 9:00 o'clock tomorrow morning.
>
> * * * *
>
> Mr. Meldon: I need additional time to prepare in that I have not discussed it with the witnesses and Mr. Wagner has done all of the preparation.
>
> The Court: It is your responsibility to contact your witnesses and discuss this case with them between now and 9:00 o'clock tomorrow morning, because that is when we will continue.

At 9:00 the following morning in chambers Meldon again advised the court that Dinitz did not want him to try the case and, that in any event he was unprepared to take the lead in the trial at that time. The judge advised counsel that he did not think that the government or the defendant could get a fair trial and stated that he was seriously considering granting a mistrial. He then declared a thirty minute recess and requested counsel for both sides to consider the alternatives. After the recess, the transcript shows this colloquy:

> Mr. Meldon: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.
>
> The Court: What does the Government have to say?
>
> Mr. Crongeyer: Your Honor, we have discussed this at some length and we think that for the reasons you have set forth already on the record a mistrial might be appropriate in this case, and the Government would not oppose a mistrial.
>
> The Court: Then I am going to declare a mistrial, gentlemen. I think under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Subsequently, the court granted Meldon leave to withdraw as Dinitz's counsel. Prior to his second trial, Dinitz moved to dismiss the indictment on the basis of double jeopardy and alternatively to have Wagner reinstated as his trial counsel, but both motions were denied. At his second trial Dinitz represented himself and was convicted on both counts in the indictment.

II.

United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 1965 (1824) is the customary starting point for determining whether retrial following a preverdict discharge of the first jury violates the de-

fendant's fifth amendment rights against double jeopardy.[3] In Perez, a murder case, the trial judge acting sua sponte granted a mistrial after the jury was unable to agree on a verdict. The Supreme Court per Mr. Justice Story, in the course of holding that the fifth amendment's double jeopardy clause did not prohibit retrial stated, "[w]e think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." This rule represents a balancing on the one hand of a criminal defendant's valued right to complete his trial before a particular jury, United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); and on the other, society's interest in fair trials and preventing "the guilty from going free", Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973). Inspired by language in Perez, subsequent cases have consistently applied this test on a case by case basis and refused to catalogue specifically the circumstances in which the declaration

[3] The fifth amendment's double jeopardy "prohibition is not against being twice punished, but against being twice put in jeopardy," United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Thus, jeopardy can attach before a trial is completed and the Supreme Court has held that in a jury trial jeopardy attaches when the jury is impaneled and sworn. *See, e.g.*, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963).

of a mistrial would be supported by "manifest necessity" or the "ends of public justice."[4]

Last year in Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) the Court distilled from previous cases a "general approach" to mistrial-double jeopardy cases premised on the "public justice" policy of *Perez*. *See also* Smith v. Mississippi, *supra*, and McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973). One line of cases holds that a mistrial is proper "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." Another supplementary line of cases forbids the granting of a mistrial on the basis of any ruling or procedure which would lend itself to prosecutorial manipulation. *See*, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); McNeal v. Hollowell, *supra*; and United States v. Cheung, 485 F.2d 689 (5th Cir. 1973).

Notwithstanding the requirements of *Perez* for mistrials granted sua sponte or at the prosecution's behest, "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." United States v. Jorn, *supra*, 400 U.S. at 485, 91 S.Ct. at 547, 557, 27 L.

[4] For examples of cases see note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

Ed.2d at 543 (1971). Thus, even if manifest necessity for a mistrial is lacking, in the absence of prosecutorial or judicial overreaching, a defendant's motion for or consent to a mistrial normally removes any double jeopardy barrier to reprosecution. United States v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), cert. denied, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270 (1972); United States v. Beasley, 479 F.2d 1124 (5th Cir. 1973); and United States v. Romano, 482 F.2d 1183 (5th Cir. 1973) [1973]. However, the mere fact of consent does not have such talismanic qualities that "mere mouthing of the motion (mistrial motion) in open court constitutes in every case waiver of a subsequent plea in bar." United States v. Walden, 448 F.2d 925 (4th Cir. 1971).

III.

The instant case is an unusual one indeed, and its unique facts must be placed in proper perspective before these legal principles can be applied. After Wagner's banishment and the court's explicit threats to deal severely with Meldon if he had ever been aware of Wagner's proposed opening statement, the court was faced with three possible courses of action: (1) it could have proceeded with trial; (2) it could have granted a continuance and reconvened with the same jury at a later date;[5] (3) or it could have declared a mistrial.

[5] The continuance would have had the effect of a mistrial if the same jury was not reconvened, since jeopardy attaches when the jury is sworn, see footnote 3, supra.

Proceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal. *See Somerville, supra.* The court's expulsion of Wagner left Dinitz without the counsel he had employed to lead the conduct of his defense. The threats to Meldon placed the only remaining trial attorney in the inconsistent position of having to protect his own standing as a member of the bar of the Northern District of Florida against any suggestion of complicity with the line of defense Wagner had begun and of acting as a vigorous and effective advocate on behalf of Dinitz. Additionally, Meldon had not prepared himself to try the case, and, after Wagner's dismissal, Dinitz made it clear that he did not want Meldon to represent him.[6]

The second course, a continuance of sufficient length to permit the employment of new counsel was also unreasonable and would likewise have failed *Somerville's* "general approach." There would have been a very real probability of prejudice inherent in releasing the jurors to go about their normal affairs in contact with the general public and news media for such a period of time. Sequestering them would have been out of the question. Additionally, the break in the continuity of the trial would poorly serve juror's memories. Most importantly, however, a continuance would saddle Dinitz with the unfavorable inferences the jurors would surely draw from the

[6] Dinitz, a third year law student at the time, was similarly unprepared to represent himself.

delay itself and from Wagner's absence at the rescheduled trial.

Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial. The instant case does not fit this mold. The actions of the court in banishing Wagner and threatening Meldon inexorably led the trial down the path to mistrial. As the government forcefully argues manifest necessity was present when the mistrial was finally granted, but we would be wrong to focus the inquiry there.[7] The die was cast with the trial judge's response to the conduct of defense counsel.

Before testing the validity of this response, we must resolve the threshold issue of whether Dinitz's consent to the mistrial operated to bar his subsequent double jeopardy plea.[8] If it did not so operate, we

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[7] The government argues and the trial judge indicated that there might have been other grounds for granting the mistrial at the time it was granted. The case had been highly publicized, and it had been reported to the court before trial that some of the jurors had overhead a comment potentially prejudicial to Dinitz by a security guard. However, the court was aware of these reasons long before Wagner was excluded and if it thought them sufficient to warrant granting of a mistrial, it would have acted earlier.

[8] We do not reach Dinitz's argument that Meldon's position of divided loyalty between representing his client and protecting his own interests operated to require a personal consent from Dinitz to the mistrial. *Cf.* Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942).

must then determine whether what the trial judge did at the time of Wagner's disbarment met the manifest necessity requirements of *Perez* and *Somerville*.

IV.

When Dinitz consented to a mistrial did he bar himself from raising the double jeopardy issue? In answering this question we need not characterize the trial judge's actions as judicial overreaching which under *Jorn, supra*, would allow Dinitz to plead double jeopardy notwithstanding consent on his part. Using a defendant's consent to a mistrial to bar his subsequent complaint of double jeopardy implies that he has bound himself to accept an abandonment of the first trial by exercising something more substantial than a Hobson's choice. If a defendant is able to continue the trial even though harmed by prosecutorial or judicial error, but desires to abort that proceeding, he has waived his right to proceed before the jury first selected. In the instant case, however, the actions of the trial judge had the effect of rendering Dinitz unable to conduct his defense. With Wagner excluded and Meldon disabled, Dinitz had no choice but to move for or accept a mistrial. Under the circumstances of this case, see United States v. Walden, *supra*, he can hardly be said to have relin-

quished voluntarily his right to proceed before the first jury.[9]

V.

Since the court's actions at the time of Wagner's banishment made the subsequent grant of a mistrial inevitable, appellate review must center on these actions rather than on the resulting declaration. Dismissal of an attorney in the midst of a criminal trial is not per se wrong. The discretion reposed in the trial court to see that the proceedings before it accord justice to the litigants is, in the abstract, broad enough to encompass such a removal. For example if defense counsel by his actions so prejudices the jury trying his client that manifest necessity exists to declare a mistrial, he may be expelled and a mistrial declared. The fact that the mistrial may be attributed to the absence of counsel is of no moment. Despite such formal characterization, the ultimate cause of the mistrial remains the counsel-provoked jury prejudice. Additionally, it is possible that an attorney's conduct can be so disruptive of the orderly processes of justice as to require his removal from the proceedings and an ensuing mistrial. Again, the manifest necessity for declaring a mis-

[9] Judge Bell incorrectly premises his dissenting remarks upon the supposition that we have either misread or misunderstood *Jorn*. As his analysis of the law of that holding shows, that is not the source of our difference. Rather, it is purely due to fact analysis. For emphasis, we reiterate that this record discloses to us that the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character.

trial would be found in the state of affairs created by counsel before the court takes action. Here our scrutiny must first be directed to the impact on the jury of Wagner's activity at this point to determine if jury prejudice can sustain the ousting of Wagner and the threats of a similar fate for Meldon.

Wagner's conduct beginning with the motion to suppress and ending with the phone call statement had required retiring the jury from the courtroom several times. Although these annoying interruptions were vexatious, it certainly cannot be said that, individually or cumulatively, they would have made an impartial verdict impossible. See *Somerville*, *supra*. Furthermore, we recognize that Wagner was guilty of improper conduct when, despite the court's ruling, he "labeled" the proceeding as the case of the incredible witness. However, this transgression had been corrected before the jury and was past when Wagner's comment about a post-arrest phone call to Dinitz was stopped in mid-sentence by an objection. This record contains no intimation that the trial judge thought the jury had been prejudiced by Wagner's mistakes of conduct up to the time they were excused upon the government's objection to the phone call statement. Even at that point the court's only expressed concern was to determine whether the *anticipated* comment was one that could be supported by admissible evidence. Even if we were to assume that counsel's actions were intended to affect the jury, the facts in the record at this time will not permit justifying the mistrial because of jury preju-

dice for this jury never heard the matter which the judge termed "character assassination." [10] If the court below considered that the jury in the first case had been prejudiced by Wagner's conduct up to this point, such prejudice could have been cured by a cautionary instruction. This being so, the existence of such curable prejudice would not support a mistrial. *See* Carsey v. United States, 129 U.S.App. D.C. 205, 392 F.2d 810 (1967).

In United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), the court based its holding that the mistrial was not supported by manifest necessity on the trial judge's failure to consider other alternatives. *See also* United States v. Cheung, *supra*. In the instant case, the court had not ruled on the matter of the admissibility or permissibility of the extortion attempt line of defense. Except for his single lapse in the "incredible witness" comment, Wagner had not demonstrated an unwillingness to comply with the court's rulings. Thus an obvious alternative to disbarring Wagner and precipitating a mistrial would have been a ruling prohibiting reference to the extortion attempt and a warning to Wagner against future interjection of this matter without first establishing a valid basis in proof. In United States v. Whitlow, 110 F.Supp. 871 (D.C.

[10] In making this determination we have not failed to give full consideration to the trial judge's superior opportunity to observe the effect of particular statements on the jury. *See, e.g.*, Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).

D.C. 1953) the court held that the defendant's rights against double jeopardy would be violated by retrial, after a mistrial, because the defendant's attorney had exceeded the bounds set by the court in examining witnesses. In *Whitlow* the court stated that grant of a mistrial for misconduct of defense counsel would not be proper except in case of misconduct going to the very vitals of the trial itself. "Minor misconduct of defense counsel, such as overstepping the limits set by the court for the examination of the witness, does not under the authority warrant a mistrial, thereby depriving the defendant of his right to secure a verdict from the jury that has been sworn to try him." 110 F.Supp. at 876.

Assuming for the sake of argument Wagner was engaged in a deliberate, contemptuous course of baiting the court and improperly attempting to assassinate the character of the principal prosecution witness, still no manifest necessity for his immediate dispatch would have existed.[11] Such misconduct could never be condoned, but insofar as the trial then in progress was concerned, other alternatives

[11] It is not at all clear that the discord between the court and Wagner was not the result of a basic misunderstanding. The court was only concerned with the existence of proof that the undercover agent Cox was the same man who had picked up the bundle left for the extortionist. If the court ever considered that Wagner may have been urging a broader contention—that Dinitz had been set up for the criminal contact with Cox in order to enable someone, not necessarily Cox or a confederate, to extort funds from him—it is not apparent from the transcript.

available to the trial judge had to be considered. *See* United States v. Jorn, *supra*. For example, the judge could have warned Wagner that he would be cited for contempt if such practices continued. He could have actually cited him for contempt and imposed post trial sanctions for each citation if he thought Wagner's conduct amounted to obstructing the performance of his judicial duty. *See* 18 U.S.C. § 401; and In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962). The trial judge could have caused a complaint to be filed with the grievance committee of the state bar or taken post trial steps to prevent him from being admitted to practice before the Northern District of Florida. In view of these and any other alternatives which would not affect the ability to continue the trial, we cannot say that there was manifest necessity for the trial judge's actions.

We have carefully read and reread the record and, although Wagner's conduct was far from exemplary and may have justified disciplinary action, we cannot conclude that taken separately or together his mistakes vested the court with discretion to deprive his client of representation in this criminal case. For emphasis, we reiterate our refusal to rule that there are no circumstances in which such a midstream disbarment would be proper. Similarly, we caveat that we do not intend to fashion any rule which would permit obstructionary conduct by defense counsel, any attempt to create a mistrial, or the adoption of a trial strategy of creating jury prejudice. Evidence

of such reprehensible practices would present a different case. We hold only that Wagner's actions did not rise to the malevolent level of creating incurable jury prejudice or requiring the banishment of counsel from the courtroom to preserve the orderly processes of justice. Adequate alternatives were available to deal with the errors which did not require sacrificing of the defendant's ability to continue his defense.

Reversed.

BELL, Circuit Judge (dissenting):

I respectfully dissent. Two basic precepts in a system of criminal justice are (1) that it be a workable institution and, (2) that it be administered in an even handed manner. The majority opinion violates both precepts. It distorts the application of the Double Jeopardy Clause of the Constitution to the extent of burdening the system, and the only result of the distortion is a windfall to defendant Dinitz.

The distortion arises out of misconception on the part of the majority as to how the Double Jeopardy Clause is to be administered. In United States v. Jorn, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed2d 543, the court was concerned with a case where the double jeopardy bar was claimed because of the grant of a mistrial by the trial court on its own motion. The test applied was that of whether the trial court abused its discretion. The majority applies the same test here, apparently giving no consideration to the different rule that obtains when the defendant

seeks the mistrial. The *Jorn* decision points up the difference in its discussion of the policy underlying the application of the Double Jeopardy Clause. The right involved is that of a defendant to have his trial completed by a particular tribunal. In adverting to circumstances when reprosecution is allowed or not allowed, the court draws the distinction between those instances when the defendant gives up his option to have the cause determined by the first jury such as by motion for mistrial, a new trial, or by appeal, and those instances where the court deprives the defendant of such option. The court said:

> "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial over-reaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." 400 U.S. at 485, 91 S.Ct. at 557.

The court explicated the prosecutorial or judicial overreaching situation by commenting that in such cases reprosecution might well be barred despite the defendant having made a motion for mistrial. 400 U.S. 485, n. 12, 91 S.Ct. 547. *Jorn* goes on to point out that in the absence of a motion for mistrial by the defendant, manifest necessity for the mistrial must appear. It was under the manifest necessity doctrine that the court applied the abuse of discretion test.

Here we have a motion by defendant for a mistrial and the error of the majority is seen in the avoidance of determining whether there was judicial overreaching on the part of the district court as distinguished from judicial error (equated by the majority opinion with an abuse of discretion).[1] Under the teaching of *Jorn*, this issue cannot be avoided. The majority is correct in applying the double jeopardy bar if there was in fact judicial overreaching. The majority is in error if the conduct of the district court fell short of judicial overreaching.

This posture of the case for decision is demanded by our own decisions following *Jorn*. *See* United States v. Romano, 5 Cir., 1973, 482 F.2d 1183, 1187-1188; United States v. Beasley, 5 Cir., 1973, 479 F.2d 1124, 1125-1126; United States v. Iacovetti, 5 Cir., 1972, 466 F.2d 1147, 1151-1152. In each of these cases the bar of double jeopardy was denied the defendant because of having sought the mistrial. Indeed, we recognized the premise in McNeal v. Hollowell, 5 Cir., 1973, 481 F.2d 1145, 1150-1151, that a defendant who engages in a course of conduct calculated to necessitate the granting of a mistrial, although not actually requesting a mistrial, may be barred from relying on a double jeopardy defense.

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[1] Given the view of the majority that further prosecution is barred, I do not reach defendant's other assignments of error including whether the district court was in error at all in removing defendant's co-counsel from the case.

The question for consideration then is whether the record makes out a case of judicial overreaching. The defendant was a third year law student who was charged with selling LSD. He was represented by retained counsel, Mr. Meldon, from the time of his arrest to trial, a period of a little over two months, and the representation was vigorous from the standpoint of efforts to discover and suppress. On the day of the trial Mr. Meldon was joined in the defense by Mr. Baldwin, the law professor who handled this matter on appeal, and by Mr. Wagner, a Florida lawyer who resided in another district and who was not admitted to practice in the Northern District of Florida. Mr. Wagner stated to the court that he would handle the facts and that Mr. Baldwin would handle law questions and that the three appeared as co-counsel. The issue to be tried was a simple one: whether the jury would believe an undercover government agent who claimed that he purchased the LSD from the defendant. The defense was to discredit the informer by showing an effort by someone to extort money from the defendant after his arrest, presumably for dropping the prosecution.

While recognizing the possibility and even probability in some cases of different inferences being drawn by different readers of records, I draw the distinct conclusion from the record that Mr. Wagner conducted himself in an improper manner from almost the moment of his entry into the case. The trouble started in a preliminary hearing on a motion to suppress. There was impropriety on Wagner's part

in the opening statement in the form of arguing, rather than stating the case and, with regard to the baseless charge of extortion against the government witnesses. The district court gained the impression that Mr. Wagner was baiting the court and I find ample support for that impression. At any rate, after Wagner was removed from the case and after the discussion between his remaining two lawyers and an overnight delay, one of his lawyers made the following representation to the court:

> "Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest."

Absent such a motion the district court could have gone forward with the trial. It may be, as is said in the majority opinion, that the case would have been reversed because of error in removing Mr. Wagner but there would have been no double jeopardy bar. It would have been the defendant who sought the reversal based on the removal of Mr. Wagner. *Jorn, supra*, 400 U.S. at 484, 91 S.Ct. 547, 27 L.Ed.2d 556.

It may be, of course, as the majority points out that other methods of control short of removal were available to the court. It may be that another judge would have utilized other methods but the question is whether the method utilized in this instance reached

the proportions of judicial overreaching. My answer is in the negative.

The sum of the majority opinion is to apply to this case the abuse of discretion test of *Jorn* where a mistrial was granted by the court sua sponte. This is simply an incorrect approach and confuses two separate tests. Here the defendant sought the mistrial and there is no factual basis for a finding of judicial overreaching as distinguished from error amounting to an abuse of discretion. The majority does not contend otherwise but simply fashions a new doctrine of double jeopardy: the bar is applicable on the basis of error amounting to an abuse of discretion on the part of the trial court despite appellant seeking the mistrial.[2] This is contrary to *Jorn*.

There are two unfortunate aspects to the majority opinion. First, the *ratio decidendi* is too extreme to be workable and will give rise to much reluctance in granting mistrials. The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

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[2] A strong argument could be made for the proposition that Mr. Wagner pursued a course of conduct calculated to cause a mistrial. *Cf.* McNeal v. Hollowell, *supra*.

Dinitz goes free but there should be little likelihood of a district court falling into a trap of the kind set here, whether set purposely or by happenstance, now that the law elucidated in the majority opinion has surfaced. Hopefully, the majority decision will thus spend itself.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2109

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

Nov. 27, 1974

Appeal from the United States District Court for the Northern District of Florida.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

[1] The court, en banc, affirms the panel opinion holding that a defendant's motion for mistrial does not remove the bar to reprosecution when the formal mistrial motion by defendant is solely caused by an abuse of judicial discretion, which though not intended to avoid an acquittal, is so damaging to the defendant that he cannot proceed with his case and submit it to the jury then empaneled.[1] The judge's

[1] 492 F.2d 53 (5th Cir. 1974).

action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible.

[2] In order for a defendant's motion for a mistrial to constitute a bar to a later plea of double jeopardy, some choice to proceed or start over must remain with the defendant at the time his motion is made. The dicta from United States v. Jorn, which is the foundation of the dissent,[2] does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away his "valued right to have his trial completed by a particular tribunal."

GEWIN, BELL, THORNBERRY, COLEMAN, AINSWORTH, RONEY and GEE, Circuit Judges (dissenting):

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[2] "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarly assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543, 556 (1971).

We respectfuily dissent for the reasons stated in the dissent filed to the panel opinion. United States v. Dinitz, 5 Cir., 1974, 492 F.2d 53, 61 (dissenting opinion).

We also note that the panel opinion in United States v. Walden, 4 Cir. 1971, 448 F.2d 925, relied upon in the original majority opinion in this case, was superseded on rehearing en banc. United States v. Walden, 4 Cir. 1972, 458 F.2d 36 (affirming district court on double jeopardy question by an equally divided court).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 73-2109

D. C. Docket No. GCR 1365

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

NATHAN GEORGE DINITZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Florida

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion entered by a panel of this Court on April 4, 1974, reversing the judgment of the said District Court in this cause be, and the same is hereby affirmed by the Court en banc.

November 27, 1974

GEWIN, BELL, THORNBERRY, COLEMAN, AINSWORTH, RONEY and GEE, Circuit Judges, dissenting.

Issued as Mandate: Dec. 9, 1974

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Gainesville Criminal No. 1365

THE UNITED STATES OF AMERICA

v.

NATHAN GEORGE DINITZ

ORDER

A mistrial having been declared in this action on February 16, 1973, this cause is now before the Court upon motion of the defendant Dinitz to dismiss the indictment in which he is charged. The defendant seeks to dismiss the indictment on the ground that to try him again would constitute double jeopardy. Also before the Court is a motion of the defendant for reinstatement of defendant's attorney Maurice Wagner. Having fully considered the memorandum of law offered in support of defendant's Fifth Amendment claim and being otherwise advised in the premises the Court is of the view that the Fifth Amendment would not be violated by a trial of this defendant and therefore the motion to dismiss the indictment should be denied. Defendant's motion for reinstatement is likewise denied.

I

The defendant Dinitz was brought to trial in the above styled cause in Gainesville, Florida, on February 15, 1973, a jury having been selected and sworn the previous morning. During the course of opening statements to the jury counsel for the defendant Maurice Wagner made improper comments to the jury necessitating removal of the jury on at least four occasions. On each occasion the Court admonished counsel, instructing him to confine himself to proper opening remarks. Nevertheless, counsel responded to the Court's instructions with argumentative and 'baiting' riposte.

Continuing in the guise of 'opening remarks' to the jury counsel thereafter sought to accuse the government agent of an extortion attempt against the defendant, counsel then knowing that he had not a whit of evidence of any such involvement by the agent. Because of such conduct which the Court considers highly prejudicial and inflammatory this Court had the United States Marshals remove the attorney Maurice Wagner from the courtroom and barred him from proceeding further in the defense of defendant Dinitz.

The attorney Maurice Wagner was not the attorney of record for the defendant and had been recognized to appear on behalf of the defendant only as a courtesy of the Court.

II

On February 16, 1973, counsel of record for the defendant Dinitz, Jeffrey Meldon, appeared in the proceedings held in Chambers of this Court and represented to the Court that he had conferred with the defendant and it was in their judgment in the best interest of the defendant to move for a mistrial in Gainesville Criminal No. 1365. The Court granted the motion for mistrial for the following reasons:

> a) The demeanor of counsel Wagner and the impression he conveyed to the jury made it impossible for the government to get a fair trial: Counsel Wagner stated to the jury that the arrest of the defendant was but an "afterthought" by the government when counsel knew that the defendant had been indicted for a substantial period of time prior to the arrest. Then characterizing his next line of remarks as "the unusual circumstances" surrounding the prosecution of defendant, counsel Wagner placed before the jury information regarding certain telephone calls which the defendant had received, Wagner then intending to tell the jury of an extortion attempt against defendant which he [Wagner] was prepared to argue to the jury involved the government agent;
>
> b) Counsel of record Meldon indicated that he was unprepared to continue and some considerable time would be required for his preparation for trial;

c) The Court felt that the defendant quite possibly could be prejudiced by the absence of the attorney who had initially addressed the jury on behalf of the defendant; and

d) It appeared to the Court that defendant no longer wished to be represented by the counsel of record Meldon, said counsel having asked the Court for leave to withdraw as counsel.

CONCLUSIONS OF LAW

It is settled law today that " 'The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. *Wade* v. *Hunter*, 336 U.S. 684, 688.' " *Gori* v. *United States*, 367 U.S. 364, 367 (1961). The Supreme Court of the United States has stated that:

> ". . . Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection and he may be retried consistently with the Fifth Amendment. . . . *Simmons* v. *United States*, 142 U.S. 148;" *Gori*, supra, p. 368.

In *Gori* the presiding judge, on his own motion made with neither approval nor objection by petitioner in that action, withdrew a juror and declared a mis-

trial. The Supreme Court affirmed the conviction arising out of petitioner's second trial noting its unwillingness, where it appears that a mistrial had been granted in the sole interest of a defendant, to hold that the necessary consequence of a mistrial is to bar all retrial. The Court explained that it was reluctant to make the federal trial courts "unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." *Gori*, supra, p. 370.

Certainly this Court has done no less for the defendant Dinitz in the case at bar. Dinitz was essentially without counsel before a jury which possibly had been prejudiced by the inappropriate conduct and the resultant absence of defendant's chief trial counsel. Thus, the Court was confronted with requiring the defendant to proceed to trial with unprepared counsel with whom defendant had irreconcilable differences. In the context of this particular trial the declaration of a mistrial was dictated by "manifest necessity." See *Illinois* v. *Somerville*, —— U.S. —— (1973) [41 U.S.L.W. 4319, February 27, 1973]. The "manifest necessity" standard upon which the holding in *Illinois* v. *Somerville*, supra, is bottomed was first articulated by the Supreme Court in *United States* v. *Perez*, 9 Wheat 579 (1824), the fountainhead decision construing the double jeopardy provision relative to declaration of a mistrial. In *Perez* the Court commented:

"We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital cases especially. Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." Id., at 580.

This the Court has done in this cause. Accordingly, it is

ORDERED:

[1] That the motion of defendant Dinitz to dismiss the indictment be and the same is hereby denied; and

[2] That the motion of defendant Dinitz for reinstatement be and the same is hereby denied.

DONE and ORDERED this 26th day of March, 1973.

/s/ David L. Middlebrooks
DAVID L. MIDDLEBROOKS
United States District Judge

★ U. S. GOVERNMENT PRINTING OFFICE: 1975 567586 96

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-928

UNITED STATES OF AMERICA,

Petitioner

—v.—

NATHAN GEORGE DINITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 27, 1975
CERTIORARI GRANTED MARCH 31, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-928

UNITED STATES OF AMERICA,

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—*v.*—

NATHAN GEORGE DINITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 6, 1972. Indictment filed.

December 7, 1972. Arrest Warrant Issued.

December 8, 1972. Defendant Arrested.

December 14, 1972. Arrest Warrant Return filed.

January 4, 1973. Defendant Arraigned; Pleads Not Guilty; Bond Raised to $15,000 Cash or Surety

January 22, 1973. Bond Reduced by Fifth Circuit Court of Appeals

January 26, 1973. Defendant's Motion to Inspect and Copy Grand Jury Minutes and To Extend Time Within Which to Move to Dismiss.

January 26, 1973. Defendant's Motion for Production of Evidence.

January 26, 1973. Defendant's Motion to Suppress Evidence

January 26, 1973. Defendant's Motion to Inspect and Copy Grand Jury Minutes and for Production of Evidence Denied.

February 9, 1973. Defendant's Motion for Leave to File Notice of Appeal on Court's Order Denying Motion to Inspect and Copy Grand Jury Minutes.

February 9, 1973. Defendant's Motion for Random Jury Selection Denied.

February 9, 1973. Defendant's Motion for Production of FBI and Other Records Denied

February 12, 1973. Defendant's Motion for Leave to File Notice of Appeal on Court's Order Denying Motion to Inspect and Copy Grand Jury Minutes Denied.

February 14, 1973. Jury Trial Commences

February 15, 1973. Defendants Motions to Suppress Evidence and for Evidentiary Hearing.

February 15, 1973. Defendant's Motion for Codefendant's Local Arrest Record Denied.

February 16, 1973. Defendant's Motion for Mistrial Granted

February 21, 1973. Motion of Jeffrey Meldon for Leave to Withdraw As Counsel for Defendant.

February 26, 1973. Motion of Jeffrey Meldon for Leave to Withdraw Granted.

February 26, 1973. Defendant's Motions for Reinstatement of Attorney Maurice Wagner and to Dismiss.

March 26, 1973. Defendant's Motions for Reinstatement and to Dismiss Denied.

April 16, 1973. Jury Trial

April 17, 1973. Defendant Found Guilty.

May 15, 1973. Defendant Sentenced.

May 15, 1973. Notice of Appeal Filed.

April 4, 1974. Panel Decision of Court of Appeals Filed Reversing Conviction.

November 27, 1974. Opinion of Court of Appeals *En Banc* Affirming Panel Decision Filed.

January 27, 1975. Petition for Writ of Certiorari filed.

March 31, 1975. Petition for Writ of Certiorari Granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Gainesville Criminal Number: 1365

[Filed in open court this Dec. 6, 1972. Clerk, U.S. District Court, North. Dist. Fla.]

THE UNITED STATES OF AMERICA

vs.

EDWARD HORACE REESE AKA "RAY"
AND NATHAN GEORGE DINITZ

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

FROM on or about October 23, 1972, and continuously thereafter up to and including the date of this Indictment, in the Northern District of Florida, and elsewhere, the defendants: EDWARD HORACE REESE aka "RAY" and NATHAN GEORGE DINITZ did knowingly and intentionally combine, conspire, confederate and agree and have a tacit understanding with each other and with diverse other persons whose names are to the Grand Jury unknown to comit offenses against the United States of America, to wit: to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In furtherance of this conspiracy the defendants did commit the following overt acts:

OVERT ACTS

1. At all times material hereto, defendants EDWARD HORACE REESE aka "RAY" and NATHAN GEORGE

DINITZ lived together at the same residence in Gainesville, Florida.

2. On or about October 24, 1972, at the residence of these defendants, EDWARD HORACE REESE aka "RAY" sold approximately 20 tablets of Lysergic Acid Diethylamide, otherwise known as "LSD".

3. On or about October 25, 1972, at the said residence of these defendants, NATHAN GEORGE DINITZ sold approximately 48 tablets of Lysergic Acid Diethylamide, otherwise known as "LSD".

COUNT II

THE GRAND JURY CHARGES:

ON or about OCTOBER 24, 1972, in the Northern District of Florida, EDWARD HORACE RESSE, aka "RAY" knowingly and intentionally did distribute approximately TWENTY TABLETS OF LYSERGIC ACID DIETHYLAMIDE, OTHERWISE KNOWN AS "LSD", a Schedule I, CONTROLLED SUBSTANCE, in violation of Title 21 United States Code, Section 841(a)(1).

COUNT III

THE GRAND JURY CHARGES:

ON or about October 25, 1972, in the Northern District of Florida, NATHAN GEORGE DINITZ knowingly and intentionally did distribute approximately FORTY EIGHT (48) TABLETS OF LYSERGIC ACID DIETHYLAMIDE, OTHERWISE KNOWN AS "LSD", a Schedule I CONTROLLED SUBSTANCE, in violation of Title 21 United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ John M. Cherry, Jr.
Foreman

/s/ Robert L. Crongeyer, Jr.
ROBERT L. CRONGEYER, JR.
Assistant United States Attorney

[44]

RELEVANT PORTION OF TRANSCRIPT OF TRIAL OF FEBRUARY 14-16, 1973

* * * *

MR. CRONGEYER: Judge, I have one further thing. I would clarify this for the record. Is Mr. Baldwin appearing as counsel of record, co-counsel of record for the Defendant in this case?

THE COURT: He said he has not asked to appear.

MR. CRONGEYER: We would ask that, Your Honor, we would object to his appearance sitting at the defense counsel table unless [45] he is appearing as counsel of record.

THE COURT: What is his—

MR. WAGNER: He is counsel. He is an attorney. He is counsel of record. He is a professor at the university, but we have been instructed not to make mention of that fact by the Court and that, of course, we will not.

We will call him Mr. Baldwin or Attorney Baldwin just as the Court has instructed us. He will make the arguments with regard to the law and I will try the facts and that is about it, Judge.

He will examine the witnesses. We filed a certificate as instructed by the Court as to his competency.

THE COURT: What basis do I have, Mr. Crongeyer, from preventing this man from appearing?

MR. CRONGEYER: Nothing, Your Honor. I just wanted to clarify his status or his position.

MR. WAGNER: Okay.

MISS HOTAL: Can I go?

THE COURT: [46] Yes, ma'am.

MR. MELDON: Thank you very much.

THE COURT: Bring the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Ladies and gentlemen of the Jury, it is going to be necessary that we take a recess in this case while the Court takes care of some legal matters out-

side the presence of the Jury. The Jury will be excused until 2:15 P.M. and I will ask you to leave the Courtroom and do not come back into the Courtroom until you are called.

The Marshal will show you where to report when you return. During this recess you are not to discuss this case with anyone, among yourselves or with anyone else. You are not to allow anyone to discuss this case in your presence or hearing.

You are also instructed not to arrive at any decision in this case until it has been finally submitted to you.

The Jury will be excused now, Mr. Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

[47] THE COURT: We will now proceed with the hearing on the motion to suppress.

The Government may proceed.

MR. REED: Your Honor, not wishing to be obstructive of this, but it is my understanding of the law that in a suppression hearing the defense or the movant bears the burden to show that the evidence should be suppressed.

MR. WAGNER: We will concede that is the case.

THE COURT: Proceed, Mr. Wagner.

MR. WAGNER: Thank you, sir. We will call Mr. Cox as a witness, and, if Your Honor please, it would appear that this might be a good time to invoke the Rule and to swear the witness and get them out of the room. They are about to hear testimony which might be affected, although I don't think it will. Perhaps it might.

THE COURT: Any other witnesses, Mr. Reed?

MR. REED: Yes, sir, Your Honor, we have witnesses we will gladly exclude, but again, I wonder about the [48] technicality so to speak of having a suppression hearing. I don't think they need to be sworn.

THE COURT: I will ask the witnesses to leave anyhow. All witnesses in this case will leave the Courtroom until you are called.

(Whereupon, the Rule was invoked.)

THE COURT: You can take the stand, Mr. Cox.

Whereupon,

STEVE JUNA COX

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Please state your name?
A Steve Juna Cox.
Q Where do you live?
A Alachua County, Florida.
Q How old are you?
A 27.
Q What is your occupation at the present time?
A I am an Enforcement Agent with District II, Gainesville, Florida.

[49] Q Was this your occupation on October 20 or thereabouts, between October 20 and the present date, 1972?

A Yes, sir, it was.
Q Were you still serving in that capacity?
A I am a Street Supervisor with the same outfit at this time.
Q Mr. Cox, it was you who initiated the arrest of the Defendant in this case, Nathan Dinitz?
A I was the case agent, yes, sir.
Q And you were the agent that made the investigation that resulted in his arrest?
A That is correct, yes, sir.
Q And it is based upon your testimony that the arrest was in fact made?
A That is correct.
Q All right, now, were there any other witnesses to the incident which formulates the basis for these charges against Nathan Dinitz other than yourself?

MR. CRONGEYER: Your Honor, I don't see the relevancy of this as to the suppression issue, what other witnesses were there at the time. We are dealing spe-

cifically with the suppression issue here in this hearing.

THE COURT: What was the question?

[50] (Whereupon, the Court Reporter read the pending question, as requested.)

THE COURT: Objection overruled.

THE WITNESS: There was surveilling agents involved who were on surveillance during this time and as far as any other witnesses, the chemist and the person that handled the evidence.

MR. WAGNER: If Your Honor please, you will recall the Defendant has stipulated to the drug being a legitimate drug, and so forth, so the chemist isn't necessary as I understand it.

At this point, Judge, we have stipulated to that and we have also stipulated to the chain of evidence. That is not involved in this case any longer. I don't know if it is a matter of record, but I think I represented that to the Court the other day and that is still our position.

THE COURT: What point are you trying to make?

MR. WAGNER: I simply wanted the Court to know that when he mentioned the chemist, that is not significant.

THE COURT: [51] I think I could remember that.

BY MR. WAGNER:

Q All right, sir, thank you. Now, this incident occurred or started on October 23rd or rather October 22nd. 1972, is that correct, this particular incident for this case began on or about October 22, 1972?

A The 23rd of October was the first time I was aware of it, of the circumstances involved.

Q All right, sir, and which was a Monday?

A Yes, sir.

Q That was on Monday, October 23rd, that you met an unidentified white male who advised you that if you had contacted a man named Ray at 1806 Southwest Avenue in Gainesville you might be able to buy some mescaline, is that right?

A Two unidentified white males.

Q There were two unidentified white males?

A That is correct.

Q Was my statement accurate?

A Yes.

Q You were told you could probably buy some mescaline at that address from a man named Ray?

A That is correct.

Q All right, you proceeded there at about 2:30 that afternoon, met another unidentified white male and was [52] advised that Ray was not at home?

MR. REED: Your Honor, I object to the form of this question. He called this witness and—

THE COURT: Objection sustained.

BY MR. WAGNER:

Q Tell the Court, please, what transpired after you learned about the possibility of making this purchase? Where did you go?

A I proceeded on that afternoon to the address.

Q 1806 Northwest 2nd?

A Yes, sir.

Q In Gainesville?

A Yes, sir.

MR. REED: Your Honor, may we ask that the witness be allowed to answer the question?

THE COURT: Proceed.

THE WITNESS: I continued to 1806 Northwest 2nd Avenue and I met with the same two white males that I had met earlier that day who advised me to go to this address.

They were standing outside the residence and [53] one approached the car and advised that Ray wasn't in and I would have to come back later, he was working.

So I departed and from there I contacted Ray the next day at approximately 1:30 P.M. and introduced myself and he introduced hisself and advised—

Q Where did this meeting take place on October 24th?

A 1806 Northwest 2nd Avenue in Gainesville.

Q All right, go ahead.

A I introduced myself as Jerry and he introduced hisself as being Ray.

Q Anyone else there at this time besides you and Ray?
A Not at this time, no.
Q And this meeting took place where, please, specifically where?
A 1806 Northwest 2nd Avenue in Gainesville.
Q What room of that house if you can identify it for us?
A I was outside and he was standing inside.
Q You were on the porch?
A At this time I was outside.
Q All right, now, when you were speaking to him were you speaking through the door?
A Through the screen, right.
[54] Q Through the screen?
A Yes, sir.
Q Go ahead.
A I advised him that I was told to come to this address and talk to him in reference to some mescaline. I might be able to buy some mescaline and he asked me to come on in and I walked on in the living room and he asked me how many I wanted.
Q This conversation you related taking place in the living room, you had been invited inside, is that correct?
MR. REED: Your Honor,—
THE COURT: Yes, Mr. Reed.
MR. REED: The Government objects and respectfully asks to be heard briefly which may save time for the Court and everybody else. It appears that counsel is on a fishing expedition of sorts which may be fishing for what he may use later in the trial and there has been no allegation other than what is mentioned in their motion that there has ever been a search or seizure.
THE COURT: Objection sustained.
MR. WAGNER: [55] This information is necessary to lay a predicate, Your Honor, for the questions that will involve our client. This is the basis for our motion.
THE COURT: You get to the meat of the coconut first then I will let you come back to it to establish it.

BY MR. WAGNER:

Q All right, sir. In any event, you did make a buy from Ray on the 24th of 20 pills of mescaline?
MR. REED: The form of that question is leading. He is on direct. The witness is on direct.
MR. WAGNER: Counsel has suggested that I get to the point, Your Honor. That is the point.
THE COURT: Answer the question.
THE WITNESS: Yes, sir, I did.

BY MR. WAGNER:

Q Now, the man named Ray is not the Defendant in this case, is he?
A No, sir, he is not.
Q You have later learned his real name, is that correct?
[56] A Whose real name?
Q The man named Ray.
A Well, I think it is Edward Reese, but I am not positive.
Q He is a co-defendant in this case?
A That is correct.
Q All right, and you have charged him as Edward Horace Reese?
A That is correct.
Q Thank you. Nathan Dinitz was not there at the time this alleged buy was made, is that correct?
A The first meeting with Ray?
Q Yes.
A No, sir.
MR. REED: Your Honor,—
MR. GROSS: Your Honor, with the Court's permission I would like to join the Government's counsel at this particular time. Counsel now is discussing an event that occurred on a previous day. It is clear, Your Honor, that what—
THE COURT: The objection is sustained. Mr. Wagner, either get to the substance of this motion to suppress or we are going to call it off right now.

[57] MR. WAGNER: All right, sir. On the 25th you had an appointment to meet Ray that same evening to get a better price on mescaline?

MR. GROSS: Objection.

THE COURT: Objection sustained.

BY MR. WAGNER:

Q You returned to the house on the 25th of October for the same purpose as before, to meet Ray, is that correct?

MR. GROSS: Objection, Your Honor.

MR. WAGNER: This is the day and time and the place that is involved in our motion.

MR. GROSS: Your Honor, first of all, respectfully, there has not been an allegation or an affidavit to show that a search or seizure occurred. All that the papers seem to indicate is that this witness at best, and obviously the Government doesn't so admit, forced himself into the house.

Now, if he wants anything and I don't think he is entitled to anything in this hearing, but the Court has [58] already so decided, he ought to ask the witness just what his conversation was with Mr. Dinitz.

THE COURT: That is what we will do at this time or this hearing will go no further.

MR. WAGNER: I would like to make—

THE COURT: Get into the motion to suppress the evidence.

BY MR. WAGNER:

Q All right, sir. When you returned on October 25th, 1972, would you tell the Court, please, who you went to see?

MR. GROSS: Objection, Your Honor. Who he went to see is irrelevant. All that needs to be shown is whether or not he spoke with Mr. Dinitz.

THE COURT: Objection sustained.

MR. WAGNER: Your Honor, we have some law to support our position.

THE COURT: You have not established a predicate for this testimony as yet and until you do it is not coming into the [59] record.

MR. WAGNER: All right, sir.

THE COURT: You start asking this man now about the unlawful search. There is a motion to suppress and an allegation of an unlawful search and I want you to get to it now.

MR. WAGNER: If Your Honor please, this unlawful search is peculiar, that is to say, that the motion is not the ordinary and usual motion.

THE COURT: I understand. That is obvious from the motions.

MR. WAGNER: In any event, it is based upon facts which I believe Your Honor will be interested in knowing about and which is necessary.

THE COURT: If you do not abide by my orders to you I am going to have you removed from this Courtroom. You proceed into the unlawful search and seizure.

MR. WAGNER: Would Your Honor object to my making a proffer in the record of the evidence that I intend to elicit and then—

[60] THE COURT: Proceed.

MR. WAGNER: Out of the presence of this witness, Judge, so I will not, you know, taint his testimony in any way. Would you allow me to do that? I think under those circumstances Your Honor can make a ruling without any further ado and we could proceed.

MR. GROSS: We have no objection.

THE COURT: The witness may step out.

(Witness temporarily excused.)

MR. GROSS: Your Honor, first of all, is this affidavit filed by Mr. Meldon on information and belief, having spoken to his client, he files here under paragraph two, the Defendant Dinitz did not voluntarily waive his Fourth Amendment Rights to by consenting to Agent Cox's entry. If the Defendant's consent was obtained by means of trickery, stealth and strategy, there is no factual allegation to support the motion for a hearing here,

Your Honor. That is just a conclusive basis, but there is no factual allegations to support any hearing.

This hearing that counsel is trying to conduct [61] for the Defendant is just a fishing expedition so that they can hear this witness' testimony prior to having to cross examine him before the Jury.

THE COURT: That is not going to happen. Go ahead and make your proffer.

MR. WAGNER: All right. If Your Honor please, we believe we can elicit evidence from this witness to show that when he returned on the 25th, he returned by appointment with Ray and that is who he intended to see at 1806 Northwest 2nd Avenue and when he arrived there Ray was not there and he for the first time met the Defendant, Nat Dinitz, and it was during that meeting and by Mr. Cox's affirmative assertion that anything of an illegal nature occurred or allegedly occurred, what we will show, if Your Honor please.

THE COURT: Say that again. I didn't understand. It didn't make sense to me.

MR. WAGNER: I will say it in more precise terms. It is our position that when Mr. Cox returned he was looking for Ray. When Mr. Dinitz advised him that no Ray lived there, Mr. Cox said, well, he was supposed to give me a price, a better price on some mescaline, that it was Mr. Cox who broached this [62] entire matter with Ray, I mean with Mr. Dinitz, and having done so he was on a fishing expedition.

It would have been as though he had gone from room to room and solicited from everyone in that house.

THE COURT: Do you mean to say he then purchased or will testify that he purchased from this Defendant?

MR. WAGNER: Yes, sir.

THE COURT: And that is the grounds for your motion to suppress?

MR. WAGNER: That as a result of his suggestion and on a fishing expedition, he says he made a purchase from Nat Dinitz, and—

THE COURT: Your position is completely untenable and if that is all you have to offer this hearing is over.

MR. WAGNER: If Your Honor please, I—

THE COURT: Is there anything else, Mr. Wagner, that you plan to present here other than what you have proffered?

MR. WAGNER: [63] That is the evidence we intended to proffer.

THE COURT: The motion to suppress is denied.

MR. GROSS: Your Honor, may the Government also make a brief statement for the record?

THE COURT: Yes, sir.

MR. GROSS: That is, that Mr. Meldon's affidavit does not show any factual basis, either by having had Mr. Dinitz sign an affidavit or Mr. Meldon signing an affidavit based on information and belief, stating forth facts which would have brought the question to the point where a hearing might have been required.

Therefore, it wasn't entitled to a hearing to begin with. I have never seen, and the Government doesn't believe that counsel for the Defendant may put another witness, Government witness on the stand in the hope that during a fishing expedition he may be able to elicit testimony favorable to him.

He either has to put Mr. Dinitz on the stand to show basis for a hearing or at least file an affidavit on information and belief, and neither of these things were done and it is entirely too tardy to do them now.

[64] THE COURT: The motion to suppress should not have been heard by the Court because it was not timely filed. The proffer establishes absolutely no grounds for a motion or an order to suppress the evidence in this case and that motion will be denied.

We will continue with the trial of this case in approximately ten minutes. We will stand in recess until that time.

(Brief recess taken.)

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Be seated, please.

Is the Government ready to proceed?

MR. REED: Yes, sir, Your Honor.

THE COURT: Is the Defendant ready to proceed?

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: Call all of your witnesses, please, gentlemen.

MR. REED: Your Honor, the Government calls Steve Juna Cox [65] and Charles Clark and Robert Ginley.

THE COURT: Mr. Wagner?

MR. WAGNER: The Defendant calls—are you ready, Judge?

THE COURT: Yes, sir.

MR. WAGNER: Susan Josephson, the Defendant, Nathan Dinitz, Debora Dunbar and Geoffrey Mandley.

THE COURT: Mr. Wagner, I think probably all of those witnesses are outside. Are they in the Courtroom? Let's call them in the Courtroom and then you can call them forward. Would you call those names again, please, Mr. Wagner?

MR. WAGNER: Yes, sir. Susan Josephson, Nathan Dinitz.

THE COURT: Answer as your names are called, please.

MR. WAGNER: Debora Dunbar.

MISS DUNBAR: Yes, sir.

MR. WAGNER: Geoffrey Mandley.

[66] MR. MANDLEY: Here.

MR. WAGNER: Don Johnson. Gerald Hale, Susan or Sue Attaway. She is here. Juna Cox.

MR. COX: Here.

MR. WAGNER: Janice Halker.

MISS HALKER: Here.

MR. WAGNER: Robert Tilchen.

(No response.)

MR. WAGNER: We will be responsible in the event we determine to use him. I have not seen him around the Courtroom. I am not asking for any capias from the Court.

THE COURT: I will depend on counsel to see that the witnesses who are not present do not come into the Courtroom while the case is in progress.

MR. WAGNER: We will accept that responsibility, Your Honor.

Ronald Stahl.

[67] MR. STAHL: Here.

MR. WAGNER: Gene Brandon.

MR. BRANDON: Here.

THE COURT: Swear the witnesses, Mr. Clerk, please.

(Whereupon, 13 witnesses were duly sworn, en masse.)

THE COURT: The witnesses in this case other than Mr. Dinitz will retire from the Courtroom and remain outside of the Courtroom until you are called into the Courtroom to testify.

While this case is in progress, you are not to discuss this case among yourselves or with any other persons and you are not to allow anyone to discuss this case in your presence or hearing.

You may discuss this case with the attorneys in the case, but only outside of the presence of each other.

The witnesses may now retire and the Marshal will show you where to remain.

MR. REED: Your Honor, the Government respectfully [68] requests an exception to the Rule for Mr. Juna Cox, who is the chief investigator of this case and also will be our first witness.

MR. WAGNER: The Defendant objects to Mr. Cox remaining in the Courtroom under the Rule on the ground, if Your Honor please, that hearing the testimony of other witnesses by the primary Government witness would prejudice and bias this Defendant's case.

THE COURT: The objection is overruled. The Government has the right to have a representative at the counsel table. Have a seat.

(Whereupon, the Rule was invoked.)

MR. MELDON: Your Honor, we would inquire as to whether or not the Government representative will be called first.

THE COURT: I think that is immaterial in view of my ruling. I assume that he is, but it really doesn't make any difference. I have ruled that he has the right to stay there, so we will continue.

Now, I want to tell counsel now that only one counsel for the Defendant is going to be able to be on his feet at one time. Only one counsel will be able to participate [69] at a time and I want to make that clear before we proceed further.

MR. WAGNER: Is that also true, Your Honor, of the prosecution. I noted this morning that both Mr. Gross and Mr. Reed participated in the argument, although I made the entire argument myself.

THE COURT: You asked me a question, did you not?

MR. WAGNER: Yes, sir.

THE COURT: The answer is that it does apply.

MR. WAGNER: Thank you.

THE COURT: The Government may make its opening statement.

MR. REED: Thank you, Your Honor.

Good afternoon, ladies and gentlemen of the Jury. My name is David Reed and I am with the Justice Department. With me at counsel table on the far side is Mr. Robert Crongeyer, Assistant United States Attorney, with whom I will share the presentation of this case and Mr. Juna Cox, the Government witness who you will first hear.

[70] We are here this afternoon pursuant to an indictment returned by the ladies and gentlemen of a Grand Jury against the Defendant, Nathan George Dinitz. There are two counts that refer to Mr. Dinitz, one being a conspiracy count which charges that on or about October 23rd the Defendant, with Edward Horace Reese, did knowingly, intentionally combine, conspire, confederate to commit offenses against the United States, to wit, to distribute controlled substances in violation of Title 21, United States Code, Section 841(A)1.

The other count against Mr. Dinitz is that he knowingly and intentionally did distribute approximately 48 tablets of lysergic acid diethylamide, commonly known as LSD, which is a hallucinogenic drug and a controlled substance under the law.

The facts of this case are very simple. At approximately 12:00 o'clock in the afternoon on the 25th of October Mr. Dinitz did sell to Agent Cox 48 tablets of lysergic acid diethylamide. Mr. Cox will testify when he takes the stand that he had gone to Mr. Dinitz's residence which is at 1806 Northwest 2nd Avenue here in Gainesville in order to see Ray, who was Mr. Dinitz's roommate.

Ray was not there. However, Agent Cox was told, was asked why he was there. He then said, well, I will come back later, and the Defendant's response was that is cool, I [71] am his roommate, what do you want, and he said, well, I was supposed to be here to see Ray and he said then, the Defendant then said do you want to buy some mescaline, to which Mr. Cox agreed and did, in fact, buy the mescaline from the Defendant at that time and place.

The second Government witness will be the chemist who analyzed this material and found it to be as the Defendant has conceded, lysergic acid diethylamide.

As you listen to the testimony here coming from the stand and view whatever real evidence is introduced, I will ask you not only as far as time goes, to listen to what is said, but also to analyze why it is said, that it is what possible interest, be that friendship, professional or what type might tend to color a witness' testimony and focus on the issue which is at hand, which is, did the Defendant sell this drug at this time as alleged in the indictment and I feel that if you do this you will return a verdict of guilty as charged.

Thank you.

THE COURT: For the defense, Mr. Wagner?

MR. WAGNER: Judge Middlebrooks, ladies and gentlemen of the Jury, I am Maurice Wagner.

I practice—I am an attorney at law and I practice in Daytona Beach, Florida. I am here to assist in the

[72] trial of the United States of America vs. Nathan Dinitz.

I will be assisted in this trial by two other co-counsel, Mr. Fletcher Baldwin and Mr. Jeffry Meldon, both of Gainesville.

All of us are representing Nathan Dinitz. I wish I can agree with counsel for the State that the facts in this case are simple because they are anything but that.

After working on this case over a period time it appeared to me that if we would given nomeclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—

MR. REED: Your Honor, we object to personal opinions.

THE COURT: Objection sustained. The purpose of the opening statement is to summarize the facts the evidence will show, state the issues, not to give personal opinions.

Proceed, Mr. Wagner.

MR. WAGNER: Thank you, Your Honor. I call this the Case of the Incredible Witness.

MR. CRONGEYER: Your Honor, I object.

THE COURT: [73] Objection sustained. I do not want to remind you again, Mr. Wagner, about what the purpose of the opening statement is.

MR. WAGNER: Yes, sir, Your Honor. I am sorry. I didn't realize that that was improper. In any event—

THE COURT: Are you suggesting—take the Jury out, will you, Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: Mr. Wagner?

MR. WAGNER: Yes, sir.

THE COURT: You appeared at this trial late. You showed up, you were not counsel of record, you have never filed an appearance. This Court was not aware of your participation until the Jury was to be selected.

I do not approve of your behavior and if you attempt to bait this Court once again, I am going to refuse to

allow you to practice law in this Court again. Do you understand me?

MR. WAGNER: [74] Yes, sir.

THE COURT: Call the Jury back in.

MR. WAGNER: If Your Honor please, I have been here for the past four days. I have been—I have driven back and forth from Gainesville almost everyday.

THE COURT: You have not filed an appearance in this case. I understood when we started to select the Jury that you would participate and did not require you to file an appearance because you stated to me that you were appearing.

The point I wish to make is that suddenly after your appearance motions, the motion to suppress which is obviously frivolous start to appear. You are also attempting to bait this Court and one more dispute with you, Mr. Wagner, and you will no longer be counsel of record in this case. Do you understand me?

MR. WAGNER: Yes, sir, but I don't know—

THE COURT: Well, have your seat now.

MR. WAGNER: Yes, sir.

THE COURT: [75] Call the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Are you ready to proceed, Mr. Wagner?

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: You may proceed.

MR. WAGNER: Ladies and gentlemen, the purpose of an opening statement is to attempt to clarify the issues or the questions which you as the Jury men and women will be called upon to determine and decide when all of the evidence has been received and Judge Middlebrooks has instructed you as to the law and once you have had an opportunity to hear argument of counsel for both the United States and for the Defendant, Nathan Dinitz.

The purpose is to clarify those issues, to pinpoint them wherever possible so there is no confusion and just

exactly what it is you are called upon to determine in this case.

As I stated earlier, I don't agree with counsel for the Government that the facts in this case are, in fact, simple, because they are nothing but simple.

[76] Let me say this. I will appear and we contend that the evidence in this case will show that the sole and only testimony which the Government may have to offer in this entire case will come from the mouth of a single witness, Mr. Juna Cox, who sits here at the prosecution table.

It will not be corroborated. The evidence will show that there is no corroboration whatever from any—

MR. CRONGEYER: Your Honor, excuse me. I hesitate to object, but my understanding of the opening statement is that it is counsel's opportunity to preview their own cases and not to cross examine and attack the case of the other side.

THE COURT: Take the Jury out, Mr. Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: Mr. Wagner.

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: The purpose of the opening statement is not to make a final argument.

MR. WAGNER: Yes, sir, Your Honor.

[77] THE COURT: Call the Jury back in. Do not do it again.

MR. WAGNER: Yes, sir.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: You may proceed, Mr. Wagner.

MR. WAGNER: I apologize to you, ladies and gentlemen.

The Government in its opening remarks read in general terms the indictment against Nathan Dinitz. The indictment covered two charges. First, the Government alleges conspiracy and this is simply an agreemnt. May I discuss this, Your Honor?

THE COURT: Yes, sir.

MR. WAGNER: Thank you. A conspiracy is simply an agreement between two or more persons to commit an illegal act and then some overt act or some affirmative act in furtherance of that agreement, and in general terms it is the opposition that the evidence will show that there was no agreement whatever between Nathan Dinitz and anyone in this case and that the Government will not be able to produce evidence of any such [78] agreement.

Of a second matter, Nathan Dinitz is charged in the second count with the sale of an illegal substance, and that evidence, ladies and gentlemen, must come from the witnesses who appear on behalf of the Government in the form of Mr. Juna Cox.

Now, we believe the evidence in this case will show, as I stated earlier, the facts are anything but simple. We believe the evidence will show that this entire matter occurred or began, it had its inception, its genesis on October 23, 1972, approximately four months or five months ago.

The evidence will show, and incidentally, let me say this to you at this time, if I may, an opening statement, as His Honor has previously suggested to you, is not evidence. Nothing that I say in this case has any evidentiary value anymore than anything that counsel for the prosecution may say, but it is the sworn testimony of the witnesses that you must base your decision upon.

However, I think it is the obligation of counsel to be full and fair in an opening statement, and I am going to do just that.

I want you to hold me responsible for doing just that during this trial. I believe the evidence in this case will show that Nathan Dinitz is a law student attending the University of Florida in his third year, his last year of [79] law school, and it has been his practice in the past, he goes to school during the two winter months and goes home on summer vacation and works to earn the sufficient funds to come back and go to school the next semester.

The evidence will show that that happened in 1972, and that in July of 1972, Nathan Dinitz did, in fact, go home on vacation.

The evidence will show that Nathan Dinitz lived in a house at 1806 Northwest 2nd Avenue in Gainesville and that house will be described to you by the testimony. It is a small house, but it has five small bedrooms, each occupied mostly by students going to the University.

The evidence will show that Nat Dinitz was either there before anyone else, or the second. I think there was one man, Jeffrey Mandly, was there before he moved in, just a few days before, and that Nathan Dinitz lived there for over a period of approximately two and a half years.

The rooms are occupied by students who see an ad in the paper or on the student bulletin board and move in, and on this particular occasion in July of 1972 when Nat Dinitz went home on vacation, someone else living in the house rented a room to the alleged co-defendant in this case, the alleged co-conspirator, a man whom you will hear called Ray.

Please try to remember that, a man called Ray, but whose real name is Eddie or Edward Horace Reese, and it [80] is this man with whom the Government contends Nat Dinitz entered into a conspiracy with.

The evidence will show that Nat Dinitz never knew or ever heard of Eddie Horace Reese or Ray in July when he went home on vacation, the summer to work, and that in fact the room was rented by one of the other people living there, a room was rented to a man named Eddie Horace Reese.

Everyone in that house, the evidence will show that everyone knew this man under one name, Eddie.

The evidence will show that Nat stayed home until October 1st, when he returned to go to school and that Eddie Reese lived in that house July, August and September of 1972, never having seen, heard or met Nat Dinitz, and that Nat returned approximately on about the 1st of October of 1972 and this date is important because it is just about three weeks before all of these events occurred.

Now, I will ask you to keep that date in mind. Nat returned to Gainesville, Florida, he returned to school on October 1, the evidence will prove this to your satisfaction, and some days later, and for the first time saw Eddie Reese.

The evidence will show that Nat Dinitz and everyone in that house made every effort to get Eddie Reese out of that house, that Nat Dinitz ordered him out, as a matter of fact, the evidence will show, ladies and gentlemen, that the only time in the next three weeks, the only time, and [81] until this incident occurred, that Nat Dinitz was ever seen to speak to or say a single word to Eddie Reese was when he told him to get out, move out of that house, and you will understand why.

The evidence will show that during the period of time that Eddie Reese lived there and he lived with other people in that house, and you will hear their testimony, they were there longer than Nat, that they observed on at least six occasions this man, Eddie Reese, smoking marijuana.

One of the men living in the house is a police officer with the City of Gainesville. You will hear his testimony and he ordered Eddie Reese out when he learned of it. This happened on at least six or more occasions.

Now, the evidence will show that Eddie Reese at approximately 21 or 22 years old, he is a fugitive from justice and we don't have him here, the evidence will show that Eddie Reese, approximately 21 or 22 years of age, living in that house, as I stated earlier, was an unemployed sometimes bartender, whereas Nat Dinitz is a young man who, after some years, has attended New York University, graduated from the School of Social, a new School of Social Sciences in New York, scholarships, came to Florida, entered the law school and was an excellent student, thought well of by all of his friends, all of his associates.

THE COURT: [82] Mr. Wagner, the evidence will not show that because it will not be admissible. Relate your arguments to the facts that you expect the evidence to show, the admissible evidence.

MR. WAGNER: Yes, sir. The evidence will show that nothing about these two men was so alike that they could have been friends or conspirators or even had anything to do with one another. The evidence will show that sometime on or about October 24, 1972, Mr. Cox allegedly, and this we have to rely upon the Government because we know nothing about it, but the evidence will show this in any case because we propose to call Government witnesses.

The evidence will show that on or about October 24, 1972, Mr. Cox met some unknown white male who directs him to this house where these students and people lived, some of them graduate students and where Eddie occupied a room.

The evidence will show—oh, incidentally, the evidence will show that Eddie lived in a room and this may be important, in a room that was immediately to your right as you enter the living room.

You walk into the front door, you are in the living room and just a matter of two or three feet to your right is a room that Eddie Reese occupied.

The evidence will show that Nathan Dinitz [83] occupied a room at the far end of the house, as far away as three or four rooms in between, and we will admit we will offer in evidence a diagram of the entire house done to scale by an architect here, showing the qualified drawing of the premises, so that you can understand just exactly what the setup was in the house.

The evidence will show, and we contend, in any event that on the 24th Mr. Cox may or may not have purchased 20 tables of some controlled substance from Eddie Reese, a man whom he knew as Ray.

The evidence will show to your satisfaction that Nat Dinitz was not there, knew nothing about this incident and that on the following day, and for some unknown reason—I beg your pardon, that on that day, on the 24th and after purchasing a controlled substance from Eddie Reese, Mr. Cox made an appointment to see him again that evening at 10:30 at that same house, to see Ray, and for some reason or another didn't return on that evening but returned the following day.

At this point, the evidence will show he never heard, never saw and knew nothing of Nat Dinitz.

When he returned he knocked on the door, Nat was in the living room and he asked for Ray.

Nat said come on in. The evidence will show that Mr. Cox asked for Ray and Nat said nobody named Ray lives [84] at this house, at which time Mr. Cox gestured toward the room immediately to his right, keeping in mind that he had been there the day before, and said the man that lives in this room, and Nat said you mean Eddie, and then a conversation proceeded to this degree.

The evidence will show to your satisfaction and you will hear this testimony that Mr. Cox then, after gesturing to the room and after identifying the person living there, Ray being Eddie, said he was supposed to have a package for me and Mr. Dinitz said I know nothing about it, at which point Mr. Cox, and these are general terms, ladies and gentlemen, you will hear the testimony from the witness stand, at which point Mr. Cox said, do you mind if I look in his room, which was open, and Mr. Dinitz said I don't care, it is not my room, and walked out of the living room, at which time Mr. Cox proceeded into Eddie's room in the presence of witnesses, then came back out of that room and left the house.

Ladies and gentlemen, as I said before, hold me responsible for this evidence. The evidence will show to your satisfaction—

MR. CRONGEYER: Your Honor, excuse me. This gentleman has said that the evidence will show to the Jury's satisfaction about four times now and I think the Jury can best determine what • • •

[85] THE COURT: The objection is overruled.

MR. WAGNER: Now comes the interesting part of this case, ladies and gentlemen, that, incidentally, is the sole basis, that particular incident on the 25th is the sole basis for the Government's charge against Nathan Dinitz, nothing else ever happened but something else did happen.

The evidence will show that Juna Cox never bought anything from Nat Dinitz. As a matter of fact, the

evidence will show on the 26th, the following day, he returned to the house again and met Nat Dinitz and said I would like to buy some drugs and Nat Dinitz said, man, don't come around here, we don't sell drugs around here. If you want to see Ray, you see Ray. Ray is not here, but that didn't stop him.

He came back two days later and made the same effort and at this time brought another Government witness, and we will produce her for you, he brought another Government Agent, Sue Attaway, and together they attempted to persuade Nat to sell them some drugs and Nat said, look, please quit coming around here, and they came a third time or a fourth time, I am not sure, you will hear this testimony, and again, and they phoned a half a dozen times in this interim, phoning for Nat, phoning for Ray, sometimes the phone was answered by [86] himself, each time attempting to persuade someone in that house to sell him some drugs, and each time he was unsuccessful.

In any event, nothing happened until December 8, no arrests were made of Eddie or anyone else, and on December 8, on December 8 the United States Marshals, along with some others, some other officers of the law, came to 1806 Northwest 2nd Avenue in Gainesville, Florida, at approximately 5:30 in the morning, banging on the door.

Debbie Dunbar was the first to awake. She resides in the house. She proceeded to the front door and when they announced they were United States Marshals and because Nat Dinitz is a law student and knew more about it, she went back.

THE COURT: What has this got to do with this case, Mr. Wagner?

MR. WAGNER: Everything to do with it, Your Honor.

THE COURT: The arrest?

MR. WAGNER: I beg your pardon?

THE COURT: The arrest by the Marshals?

[87] MR. WAGNER: I think so, Your Honor.

THE COURT: You have five more minutes.

MR. WAGNER: All right. In any event, the Marshals entered, they were looking for Eddie Reese, they had no warrant for Nat Dinitz, everyone gave them their names and showed them their license and they left, and only to return two hours later as an afterthought to arrest Nat Dinitz.

Nat was arrested, released on bond and now, ladies and gentlemen, really comes the unusual circumstances.

Some week or ten days later Nat began to get telephone calls offering—

MR. CRONGEYER: Your Honor, I object to any comments of this nature. It is totally irrelevant. I ask that the Jury be excused, Your Honor.

THE COURT: Take the Jury out, please.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: What were you going to say next or present to the Jury next?

[88] MR. WAGNER: If Your Honor please, I was going to present the fact that there was an extortion attempt made against Mr. Dinitz.

THE COURT: Will you connect this officer with it?

MR. WAGNER: Yes, sir, if you give me an opportunity to, if you hear me out, I think—

THE COURT: All right, go ahead.

MR. WAGNER: I trust that you will. The evidence will show, Judge, what I propose to say to the Jury is—may I step forward so I don't have to speak too loud?

THE COURT: Yes, sir.

MR. WAGNER: That sometime after his arrest and his release on bond he was contacted by telephone by someone who said that he could quash these charges against him, that the case would never come to Court in exchange for $2,000.00, that he notified his attorney who then called the F.B.I. and that Mr. Hale, Mr. Gerard Hale and Mr. Dan Johnson were called in, and they spoke with Nat, and after speaking with him they set up a [89] time when the next telephone call was to come in, they came to 1806 Northwest 2nd Avenue and awaited the call. The call came in at the appointed time, at 6:30.

The call told Mr. Dinitz to put the $2,000.00 in an envelope, to take it to a 7-11 behind the University Book Store and he would receive further instructions by telephone there, that the F.B.I. men then sliced up some paper, put it in an envelope, gave it to Nat and told him to proceed to the 7-11 and they went along with him.

They went inside and read papers while he remained outside at the telphone and the phone call came in.

The phone call directed Nat to take the money—

THE COURT: Look, you can shorten this. I appreciate your—

MR. WAGNER: If you give me two more minutes.

THE COURT: Well, you will have more than that. Let's get to this witness. I want you to connect it with this witness and do it hurriedly. The Jury can listen to it if it is admissible. Let's get to the point.

MR. WAGNER: The evidence will show that they set up a surveillance, that a man made a pass at the Dempster Dumpster in the presence of two F.B.I. Agents, or at least one of them, [90] I am not sure, I have not talked with them, Judge, but the evidence will show that they were there, they saw the man, the man reached under the Dempster Dumpster and grabbed the money and got away, and that this extortion attempt, if Your Honor please, the F.B.I. can identify this man, they can describe him. I don't know what the description is, but certainly it would lend credence to Mr. Dinitz's defense.

THE COURT: Well, now, you still have not answered my inquiry.

MR. WAGNER: Yes, sir.

THE COURT: Would you please listen to my question because I want you to be sure and understand me.

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: How do you link that to this Government witness, Agent?

MR. WAGNER: How do we link it?

THE COURT: Yes.

MR. WAGNER: [91] Well, we believe that it can be linked on two basis.

THE COURT: All right.

MR. WAGNER: If the description fits that of Juna Cox, then Juna Cox's credibility is in issue and inasmuch as the Government is relying upon his testimony alone the Jury has a right to test his credibility by reason of any illegal acts which he himself may commit.

If, on the other hand, that description fits Eddie Reese, if that description fits Eddie Reese and we have not been able to secure that description, but if it fits Eddie Reese, then it indicates clearly that Eddie Reese or the Jury could well find that Eddie Reese committed this act with the intention of extorting money from Nat Dinitz and was simply unsuccessful in doing so.

THE COURT: Call the F.B.I. Agents now. I want them in here now, and if you cannot convince me that this testimony is admissible you will leave this court house today.

MR. WAGNER: Yes, sir.

THE COURT: And not only that, you will not come back.

[92] MR. WAGNER: If Your Honor please, let me make an objection.

THE COURT: You just have a seat.

MR. WAGNER: I would like to make an objection.

THE COURT: Have a seat, Mr. Wagner. Is this one of the witnesses?

MR. WAGNER: I have never seen them, Judge. If this is Mr.—what is your name?

MR. CRONGEYER: This is Mr. Johnson with the F.B.I.

THE COURT: Do you mean you are making these statements to the Jury and you have not even talked to this man?

MR. WAGNER: I have evidence, if Your Honor please,—

THE COURT: Where did you get it and tell me what it is.

MR. WAGNER: I just outlined it, Judge.

THE COURT: Where did you get it?

[93] MR. WAGNER: Mr. Meldon, Mr.—

THE COURT: Let Mr. Meldon come up and examine these witnesses if he has talked to them.

MR. WAGNER: Yes, sir.

THE COURT: Have you talked to them, Mr. Meldon? On your feet.

MR. MELDON: Your Honor, I have talked to Mr. Johnson. I have not talked to Mr. Johnson extensively since the date of the extortion incident.

THE COURT: Has anybody told you or do you have any information that this man, Cox seated here, was described as the person getting that envelope from that Dempster Dumpster, or whatever it is?

MR. MELDON: Your Honor, I have—

THE COURT: Answer my question.

MR. MELDON: I have no information that would lead me to [94] believe it was any person. I have not had that person described to me.

MR. CRONGEYER: Your Honor, may I be heard on this?

THE COURT: Yes, sir, you may.

MR. CRONGEYER: Your Honor, I think this constitutes a personal assault on a man's reputation. It is groundless character assassination. It is slanderous and grounds for a civil suit and has no basis whatsoever in fact.

THE COURT: Is this all you have, counsel for the defense, as far as this witness Cox is concerned?

MR. MELDON: I—

THE COURT: Just answer yes or no. Don't waste the time of the Court any further.

MR. WAGNER: I beg your pardon, Your Honor.

THE COURT: Is this all of the evidence you have to connect this witness to Cox to that Dempster Dumpster?

MR. WAGNER: [95] I don't know what better evidence than the F.B.I. themselves.

THE COURT: You will leave this Courtroom immediately and you will never practice law in this Court again, Mr. Wagner. I direct you to leave now. Mr. Marshal, see that he leaves the building immediately.

You two gentlemen may retake your seats in the witness room.

This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination, and I hope, Mr. Meldon, that you are not responsible or any part of it. I will ask you now if you are. Did you discuss with Mr. Wagner what his opening statement was going to consist of and the evidence that he was going to attempt to put before this Jury with respect to those phone calls and extortion attempts?

MR. MELDON: Your Honor, I did not prepare the opening statement and Mr. Wagner prepared his opening statement independently.

THE COURT: This is the worst exhibition I have seen. I am going to inquire of you further as to your knowledge of what Mr. Wagner was attempting to do. [96] Mr. Wagner knew without a doubt that this was inadmissible, highly prejudicial and nothing but character assassination, and I am going to inquire of you further, and if I find that you had anything further to do with it I am going to take further action in your regard, too.

Mr. Baldwin, did you know what this lawyer was going to attempt to do before this Jury?

MR. BALDWIN: No, Your Honor.

THE COURT: Have a seat, sir.

MR. CRONGEYER: Your Honor, we have some evidence that Mr. Meldon in fact did know of this beforehand.

THE COURT: I would like to hear it.

MR. CRONGEYER: And I think Mr. Reed and myself both know of this.

THE COURT: You have knowledge of this of your own personal knowledge?

MR. CRONGEYER: Personal knowledge, yes, sir.

THE COURT: [97] Let me hear from you.

MR. CRONGEYER: Your Honor, we talked about this with Mr. Meldon beforehand. We discussed it, in fact, last night at the Flagler Inn where we were presently staying. We were told at that time that this was the evidence sought to be elicited at this trial and we expressed our belief at that time that it was groundless, that there was no connection with Mr. Cox, no evidence to this effect whatsoever and that we felt it would be uncalled for.

THE COURT: Mr. Meldon knew this?

MR. CRONGEYER: I believe he did know of this thing beforehand.

THE COURT: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently you called him in to be associated with you.

Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner.

MR. MELDON: Your Honor,—

THE COURT: [98] And to prejudice this Jury.

MR. MELDON: Your Honor, Mr. Wagner has been involved in this case for at least a week and a half. I was completely responsible for the preparation of this case up until that time. Since that time, I have taken over—I have done investigation into the case, but I have not been responsible for the preparation of the opening statement, of examination of the witnesses and the information that I conveyed to Mr. Wagner concerning the incidents that happened with the F.B.I. were factual and truthful and any statements that were given to him, he made a determination as to what had happened.

I have not at anytime represented to him that Mr. Cox was an Agent involved in extorting any money.

THE COURT: Did you and he discuss the admissibility of this testimony that he was going to tell the Jury was going to be put before them?

MR. MELDON: No.

THE COURT: Are you in a position to proceed now or do you need some additional time to prepare and discuss this case with the witnesses?

MR. MELDON: [99] I need additional time to prepare in that I have not discussed it with the witnesses and Mr. Wagner has done all of the preparation.

THE COURT: Call the Jury back in. Wait just a minute. It is your responsibility to contact your witnesses and discuss this case with them between now and 9:00 o'clock tomorrow morning, because that is

when we will continue. You started to say something, Mr. Dinitz.

MR. DINITZ: No, sir.

THE COURT: Call the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Ladies and gentlemen of the Jury, it is going to be necessary that we take a recess in this case until 9:00 o'clock tomorrow morning. I want to impress upon your minds that during this recess you are not to discuss this case with anyone. You are not to allow anyone to discuss this case in your presence or hearing.

You are further instructed not to arrive at any conclusion in this case. I am going to further instruct you not to read any newspapers until this case is concluded, [100] not to look at any television news programs, or not to listen to any radio news programs while this case is in progress and until it is concluded.

MR. MELDON: May I approach the bench, Your Honor?

THE COURT: Yes, sir.

(Whereupon, the attorneys approached the bench and the following conversation was had outside the hearing of the Jury.)

MR. MELDON: The Defendant has stated to me that since I was not hired to argue the case he is in a quandary because he hired Mr. Wagner to argue the case and he feels he needs more time to obtain outside counsel to argue the case for him.

THE COURT: That comes too late. You are his counsel and have been. I will consider it between now and 9:00 o'clock tomorrow morning.

(End of conference at the bench.)

THE COURT: Call the witnesses in in this case, please.

Ladies and gentlemen, we are going to take a recess until 9:00 o'clock tomorrow morning. During this period of time you are not to discuss this case either among

[101] yourselves or with any other persons. You are not to allow anyone to discuss this case in your presence or hearing.

You may discuss this case with the attorneys in the case, but only outside of the presence of each other, and I stress, only outside of the presence of each other.

You may now take a seat out in the Courtroom. We will stand in recess until 9:00 o'clock A.M. tomorrow morning.

(Whereupon, at 2:53 P.M. the hearing in the above-entitled matter was recessed, to reconvene at 9:00 o'clock A.M. the next day.)

[102] MORNING SESSION

February 16, 1973
9:00 O'clock A.M.

IN CHAMBERS

THE COURT: Did you gentlemen have some matter you wished to present to me?

MR. MELDON: Yes, Your Honor. The counsel at this time is in a difficult position as far as going forward representing the Defendant, Nathan Dinitz. After spending considerable time looking into the law it is my opinion and I believe the opinion of Professor Baldwin that the action of the Court yesterday was well within the discretion of the Court and would not be reversed by the Court of Appeals.

This would leave the alternative to the Defendant of either going forward on his motion regardless of the advice of counsel or requesting a mistrial or he could ask for a motion—he could submit a motion to recess and ask that he go forward.

The Defendant at this time is in a financial bankrupt position and does not have the funds to go forward with an appeal.

This is subject to the Defendant getting money at some other time, but the defense counsel, I don't even know [103] if it is ethical for me to absorb any costs for an appeal, but I am certainly not in a position to do it, and I think that there is a serious question as to whether or not there is any substance to the appeal and I think that the Defendant would have the option of requesting a mistrial and that I would advise him to request that, but I cannot require him to do that, and the Defendant has also indicated to me that he wants Mr. Wagner to try his case.

He does not want me to try his case. I am also in a position where I feel that I could not try the Defendant's case after the opening remarks by counsel Wagner, and that I would not be able to give the Defendant a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening

remarks, and I was not part of the preparation of the opening remarks, and I am in a position where I at this time am not sure how to proceed.

THE COURT: Do you have anything you wish to say, Mr. Crongeyer?

MR. CRONGEYER: No, sir, Your Honor. I don't think there is anything I can add to it or offer concerning it. I think we stated in our response or our telegram to the Fifth Circuit all of our position on the thing, and I believe you were [104] furnished with a copy of that telegram.

THE COURT: Let me make some observations. There are a number of avenues that could be taken. Professor Baldwin, do you have anything you wish to say?

MR. BALDWIN: No, Your Honor, except that when you or when the Court dismissed Mr. Wagner yesterday, my immediate reaction was to attempt to get some research on the matter which I did at the law college, attempting also to get some advice from the Clerk of the Fifth Circuit as to what to do now, since immediately upon leaving the Court yesterday Mr. Dinitz did inform both of us that he would not be represented by either one of us.

I am not a trial attorney, so obviously not myself in the matter. After a full night's research it is my conclusion that the Court's action was proper and that the only possible way that it would be an appeal from that would be if Mr. Wagner returned to the Court and was then held in contempt of court.

Therefore. I believe our hands are pretty much tied, since Mr. Dinitz will not let Mr. Meldon go forward.

As far as appeal grounds, which is where I come in, as far as helping to advise the student, at this juncture I have difficulty seeing any basis for appeal.

[105] THE COURT: Let me make some observations. There are a number of avenues, one of which was the application to the Court of Appeals for a stay or a recess pending a disposition of this matter of the expelling of counsel who was not counsel of record in this case and who did not appear until the day the Jury was to be selected, and who apparently at that point was attempting to just take over the defense.

Another avenue is to proceed to trial which apparently, at least today, is not possible since Mr. Dinitz has indicated to you two gentlemen that he will not allow you to proceed in his behalf, which would mean that then he would be left without counsel.

The third avenue would be to declare a mistrial in this case, thereby leaving the Defendant with the opportunity to obtain counsel.

Factually this Court is obviously of the opinion that Mr. Wagner's conduct is reprehensible. In his opening statement, prior to the time that the Court stopped him, and ordered him to leave the Courtroom and allow counsel who represented Mr. Dinitz to continue, he made a number of statements which were prejudicial to the Government.

He left in the minds of the Jury the thought that there was either some conspiracy against Mr. Dinitz or that he was being the victim of an extortion attempt by the [106] Agent for the Government, even though he did not completely get into the factual matter surrounding that extortion attempt.

He did, however, make a statement to the Jury which was highly prejudicial involving the failure of the Government Agents to arrest him at the time they first went to the premises for the purposes of arrest.

Any experienced trial attorney, and especially one of Mr. Wagner's experience, knows that that is highly improper and highly prejudicial to the Government.

The two F.B.I. Agents involved in the investigation of the extortion attempt were examined by this Court in camera and they stated that they had never discussed this case with counsel for Defendant at all, that the person who allegedly picked up the package which contained the fake money had no resemblance whatsoever to the Government Agent.

For the record, the Government Agent is approximately 5 feet 5 or 5 feet 6. The person who picked up the money according to the Agents, was at least 6 feet 1. To quote one of the Agents, there was as much difference in the resemblance of this Agent and the man that picked

up the money as night and day, and I am quoting from the Agent himself.

There was obviously an attempt by the Counsel making the opening statement for the Defendant to prejudice that Jury against the Government to where there could not [107] possibly be a fair trial.

There was also an announcement over the local news media last week that during this period of time when this case would be tried there was going to be a shocking matter that the public would hear of.

That could only have been referring to this trial. That was evident because of the crowd that appeared for this trial, including news media, representatives and others in the community, at least three or four times as many spectators as has appeared in any other of these cases which started being tried on February 6th.

There is bound to be widespread publicity, if it has not already occurred having to do with this trial, having to do with an alleged extortion attempt directed at the Defendant.

Defense counsel on numerous occasions in the opening statement attempted to argue the case, not factually as he was required to do, but making and giving his own personal beliefs as to what the evidence was in this case. He ignored the Court's admonition to desist.

Because of all of these reasons and because of the fact that the Jury was sent out on numerous occasions and now the counsel who was making the opening statement for the Defendant will not be present, I am seriously considering granting a mistrial because of the fact that the Government [108] nor the Defendant could get a fair trial. I am going to consider that for a period of time and I will advise counsel what my decision is with respect to the future progress of this litigation.

In the meantime, I think counsel for the Defendant ought to inquire as to what he wishes to do, whether he wishes to have a recess so that he can obtain other counsel or whether he wishes to move for a mistrial.

I would also suggest to the Government that they consider what the position of the Government would be with respect to a mistrial in this case and have this case tried at a later time when there is a possibility

that this widespread publicity would not permeate the atmosphere.

I will talk to you gentlemen later as soon as you have had an opportunity to consider the comments I have had to make. I will not enter an order to allow this man to proceed further in connection with his request of the Fifth Circuit Court of Appeals for a stay order to have this attorney who was removed from the Courtroom to represent him further.

I will not allow, enter an order to allow him to proceed in forma pauperis. It is my opinion that that would be frivolous and I will not enter such an order.

If the Defendant is financially unable to proceed in the defense of this action, the Court will, of [109] course, entertain a motion to have him declared a pauper so that he can get counsel together with investigative services and other costs being furnished at the expense of the Government.

Are there any questions as to my remarks?

MR. CRONGEYER: We have none.

THE COURT: Or the statements that I have made to counsel?

We will take a approximately thirty minute recess while you have an opportunity to consider our discussion.

(Brief recess taken.)

IN CHAMBERS

THE COURT: Have you gentlemen any further thoughts about how we should proceed in this matter?

MR. MELDON: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

THE COURT: What does the Government have to say?

[110] MR. CRONGEYER: Your Honor, we have discussed this at some length and we think that for the reasons you have set forth already on the record a mistrial

might be appropriate in this case, and the Government would not oppose a mistrial.

THE COURT: Then I am going to declare a mistrial, gentlemen. I think under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

All right, let's go in the Courtroom.

MR. MELDON: Your Honor, may I inquire further as to whether or not you intend to reset it for this term?

THE COURT: No, sir, I will not reset it for this term because I do not think sufficient time will have elapsed to give the Government and this Defendant the proper atmosphere unless there is some objection to that.

MR. MELDON: No, no objection on the part of the Defendant.

THE COURT: How about the Government?

MR. CRONGEYER: Your Honor, we have no objection.

[111] MR. MELDON: Thank you, Your Honor.

(Whereupon, the conference in chambers was concluded.)

THE COURT: Good morning. Be seated, please.

Ladies and gentlemen of the Jury, the Court has decided to declare a mistrial in this case. It will therefore not be necessary for you to deliberate in this case. You are therefore discharged as the Jury selected to try this case. Those of you who came in to serve beginning on February 6, 1973, are discharged as Jurors for this term of Court. Those of you who reported on the 12th of February will report back at 9:00 o'clock A.M. on Tuesday, February 20, at which time we will proceed to begin the trial of some other cases.

I understand from the Clerk that there are no Jurors on this Jury who reported on the 6th. All of you, then, will report back on Tuesday, the 20th of February at 9:00 o'clock A.M.

We will stand in recess until Tuesday, February 20, 1973, at 9:00 o'clock A.M.

(Whereupon, at 10:10 A.M. the hearing in the above-entitled matter was concluded.)

[112] IN CHAMBERS

February 23, 1973
9:00 o'clock A.M.

THE COURT: This is a hearing on a motion filed by Mr. Meldon to withdraw in Gainesville Criminal No. 1365, United States of America vs. Nathan George Dinitz.

Mr. Dinitz, have you had an opportunity to look at that motion?

MR. DINITZ: Yes, sir, I have.

THE COURT: Do you have any objection to his withdrawing?

MR. DINITZ: Well, I prefer not to answer until I have consulted with counsel. I plan to submit a motion for reinstatement of Maurice Wagner as counsel.

THE COURT: The question to be decided here is if you intend to insist on Mr. Meldon remaining as counsel.

MR. DINITZ: Well, I don't think I can make an adequate appraisal without consulting my attorney.

THE COURT: Mr. Meldon, in the motion you state there are [113] irreconcilable differences, is that right?

MR. MELDON: I believe so, yes, sir.

THE COURT: And you do not desire to proceed further?

MR. MELDON: No, I do not, Your Honor.

THE COURT: I am going to grant your motion. Perhaps a short order for the Court to sign allowing you to withdraw.

MR. MELDON: Thank you, Your Honor.

MR. DINITZ: Your Honor, at this point I would like to mention that I have spent quite a bit of money in attorney's fees and I now find myself with no attorney to represent me.

THE COURT: Mr. Dinitz, I thought I had already made this clear, but I am not sure you were present. If you are unable to hire an attorney, if you are unable to pay costs and the necessary fees for any investigative services there is a provision for the Court to appoint competent counsel to represent you in this case at no expense to you, and at no cost to you, so if you get in that

position to where you are unable to afford to hire one, you ought to notify the Clerk [114] of this Court and a competent attorney will be appointed to represent you.

I would suggest that you make that determination and advise the Court so that someone can be appointed to represent you at an early date so there will not be any delay.

MR. DINITZ: I would just like the record to read that I have not waived my right to counsel at this hearing. I would like the record to read that I have not waived my right to counsel at this hearing.

THE COURT: The record will so reflect.

MR. DINITZ: Thank you, Your Honor.

THE COURT: Yes, sir.

(Whereupon, the hearing in the above-entitled matter was concluded.)

SUPREME COURT OF THE UNITED STATES

No. 74-928

UNITED STATES, PETITIONER,

v.

NATHAN GEORGE DINITZ

ORDER ALLOWING CERTIORARI
Filed March 31, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 375426 191

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IN THE SUPREME COURT

OF THE UNITED STATES

74-928

October Term, 1974

United States of America,

Petitioner

v.

Nathan George Dinitz,

Respondent

AFFIDAVIT

I, Nathan George Dinitz, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to respond to the government's objection to the opinion below.

5. I desire that my court appointed attorney below represent my cause in this court.

6. The nature of said cause is briefly stated as follows:

I was brought to trial having been charged with comspiracy to distribute a Schedule I controlled substance in violation of 21 U.S.C. 846 and distributing such substance in violation of 21 U.S.C. 841 (2) (1). After my chief defense counsel was ordered out of the courtroom by the trial judge, my first trial was aborted. I proceeded, pro se, in a second trial, having raised due process and double jeopardy questions, and was found guilty on both counts. I filed in forma pauperis in the Fifth Circuit Court of Appeals pursuant to the Fifth Circuit Court Rule 7, my request was granted and Professor Fletcher N. Baldwin, Jr. was appointed to prefect my appeal. The Fifth Circuit reversed my conviction finding that the trial court's action constituted double jeopardy. 492 F.2d 53 (5th Cir. 1974). After granting the government's motion for rehearing en banc, the full court, fifteen judges sitting, affirmed the panel's decision. 504 F.2d 854 (5th Cir. 1974). The Solicitor General of the United States has now petitioned the United States Court of Appeals for the Fifth Circuit for a Writ of Certiorari.

My position below which was sustained by the Fifth Circuit en banc centered around the fact that the action of the trial judge resulted in my being placed twice in jeopardy in violation of the Fifth Amendment and my being denied effective assistance of counsel in violation of the Sixth Amendment.

Nathan George Dinitz
NATHAN GEORGE DINITZ

Richard Warren
NOTARY PUBLIC

Notary Public, State of Florida at Large
My Commission Expires Aug. 22, 1978
Bonded by American Fire & Casualty Co.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-928

UNITED STATES OF AMERICA,

Petitioner

versus

NATHAN GEORGE DINITZ,

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Brief for the Respondent Nathan
George Dinitz in Opposition

FLETCHER N. BALDWIN, JR.
HOLLAND LAW CENTER
UNIVERSITY OF FLORIDA
GAINESVILLE, FLORIDA 32611
ATTORNEY FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO.

UNITED STATES OF AMERICA,

Petitioner

versus

NATHAN GEORGE DINITZ

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

Brief for the Respondent
Nathan George Dinitz in Opposition

OPINIONS BELOW

The initial opinion of the Court of Appeals (Petitioner App. A, pp. 12-252) is reported at 492 F.2d 53 (5th Cir. 1974). The per curiam opinion of the Fifth Circuit Court of Appeals en banc (Petitioner App. 13, pp. 26a-28a) is reported at 504 F.2d 854 (5th Cir. 1974). The opinion of the District Court (Petitioner App. D, pp. 31a-37a) is unreported.

JURISDICTION

The judgement of the Court of Appeals en banc (Petitioner App. C, PP. 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a Writ of Certiorari to and including January 26, 1975. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the court below erred in concluding that the trial judge's action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible.

Whether the court below erred in concluding that judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away defendant's valued right under the Fifth Amendment to have his trial completed by a particular tribunal.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

The Sixth Amendment to the United States Constitution provides in part:

> ... In all criminal prosecutions, the accused shall enjoy the right to ...the Assistance of Counsel for his defense.

STATEMENT

The respondent, Nathan George Dinitz, was charged with violating 21 U.S.C. 841(a) and 21 U.S.C. 846: conspiring to distribute and distributing a schedule 1 controlled substance. On the day of his arrest the defendant retained local counsel, Jeffrey Meldon, Esquire, to conduct his pre-trial defense until he could find an experienced criminal trial lawyer to conduct his defense. A week before trial, respondent retained Maurice Wagner, Esquire, an experienced trial advocate to conduct his defense. Although Mr. Wagner was not a member of the bar of the Northern District of Florida, he was admitted by the court and recognized by that court as defendant's lead counsel. (1 R. 77 & 80). The same courtesy was extended to one of the government attorneys (11 R. 56). The trial judge, the honorable David Middlebrooks, informed the jury that Mr. Wagner would represent the respondent (11 R. 12). There was no objection by the government to Mr. Wagner's presence (11 R. 44-46).

On February 15, 1973, trial began. Mr. Wagner's opening statement to the court was a motion to suppress, made outside of the presence of the jury (11 R. 30). During the hearing on the motion to suppress the court engaged in its first exchange with Mr. Wagner by informing him that he would be removed from the courtroom if he continued to present his motion in an argumentative fashion (11 R. 59). The motion to suppress was denied, and the newly selected

jury was called back into the courtroom.

At the conclusion of the government's opening statement -- which included a personal opinion and final arguments in the statements by the government attorney without any rebuke by the judge (11 R. 71) -- Mr. Wagner began his opening statement to the jury, first telling them that he represented Mr. Dinitz (11 R. 71-72). Neither the government nor the court chose to challenge his statement. He then proceeded with his opening statement until he told the jury that he would call this the "Case of the Incredible Witness" (11 R. 72), whereupon the government objected. This objection was sustained on the ground that the statement was a personalopinion and personal opinions had no place in opening statements. Wagner apologized to the jury, observing that he did not realize the statements were improper. At that point the trial judge removed the jury (11 R. 73). Outside of the presence of the jury, the judge accused Wagner of baiting the court and issued the second threat of removal of Wagner (11 R. 73).

The second time the jury was removed involved a government objection that Mr. Wagner was presenting a final argument; the jury was promptly removed and the objection immediately sustained. (11 R. 76) When the jury returned, Mr. Wagner apologized to them. (11 R. 77) The prompt action of the government and the court prevented any influence to be felt by the jury and remedied any possible impropriety.

The third and final removal of the jury occurred when Mr. Wagner said: "Some week or ten days later Nat began to get telephone calls offering--" (11 R. 87). The government objected, arguing that Wagner was moving into irrelevant material. The court immediately removed the jury and ordered Mr. Wagner to proffer his evidence to show that the statement he was about to make was not irrelevant. The court stated that unless Mr. Wagner could convince the court that the disputed evidence was both relevant and admissible, he, Mr. Wagner, would be removed permanently from the courtroom (11 R. 88-95). What was the disputed evidence in question? The Fifth Circuit panel speaking through Judge Clark summed it up when he pointed out that:

> The crux of the government's case on both counts was to be the testimony of Agent Cox as to the circumstances of his purchase from Dinitz. Wagner's trial strategy was to attack the credibility of Cox; a part of this strategy was to put before the jury at the outset the idea that Dinitz had been "set up" with the sale to Cox as a predicate for a subsequent extortion attempt. Wagner intended to offer proof that a week after his arrest Dinitz had received a phone call from someone who offered to arrange for all charges to be dropped if Dinitz would pay over a certain amount of money. Obviously, Wagner hoped the jury would infer from this evidence either that Cox was the extortionist or that he had some part in the scheme. Ample proof of the attempt at extortion was known to be available to the defense. United States v. Dinitz, 492 F.2d 53, 54-55 (5th Cir. 1974).

Unable to convince the court of the relevancy of the evidence ordered proffered, the court, still outside the presence of the jury, ordered Mr. Wagner removed by stating:

"You will leave this courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now" (11 R. 95). At no time did the court consider alternatives.

Once Chief Defense Counsel Wagner was out of the courtroom, the trial court turned its attention to Mr. Meldon, the attorney retained to handle Dinitz's pre-trial defense. Inquiry was made of Meldon as to his complicity with Wagner in trial preparation (11 R. 95-97). Meldon denied being a party to the preparation and further stated that he was unprepared to try the case. The court proceeded to threaten Meldon with removal -- no other disciplinary action was ever discussed -- unless Meldon could convince the court that he did not aid Wagner in preparing the opening statement. Meldon continued denying complicity and further stated for the record that he had not been retained to conduct the trial defense, that he was not prepared, and finally that defendant Mr. Dinitz did not want him. Although the trial judge would later agree with Mr. Meldon (1 R. 76-81), he nevertheless ordered Meldon to be ready to proceed the next morning (11 R. 100-103).

The fact that Mr. Meldon wished to be removed from the case became obvious the next morning when Mr. Meldon appeared at a hearing in chambers from which the defendant was excluded and stated that the defendant did not want him, that he was not prepared, and that he did not want to try the case

(11 R. 103). Whether intended or not, the court had caused Mr. Meldon to be placed in the awkward position of expressing divided loyalties. The court finally accepted Mr. Meldon's motion to withdraw, thereby, in effect, concurring with him as to his untenable position (11 R. 112). Thus, after Wagner was removed, it was apparent even to the court that Mr. Dinitz was without counsel to proceed in his best interest (1 R. 80).

During the in-chambers proceedings and after Mr. Meldon had stated to the court that he could not proceed, the court on its own and for the first time discussed mistrial. "I am seriously considering granting a mistrial because of the fact that the government nor defendant could get a fair trial" (11 R. 108). After suggesting the idea for a mistrial, the court recessed the hearing. When the hearing resumed, Mr. Meldon stated that he had spoken to the defendant and, after a full consideration of the situation, desired to move for a mistrial. A mistrial was declared. (11 R. 109). A mistrial was granted for the following reasons: (1) Mr. Wagner had made improper comments before the jury, and he had prepared to argue that the respondent was the victim of an extortion attempt by the principal government witness, (IR. 77, 78; IIR. 105-106)(2) Co-counsel Meldon was unwilling and unprepared to represent the defendant any further; (IR. 78; IIR. 100)(3) it appeared

from Mr. Meldon's statements that the respondent did not wish Mr. Meldon to further represent him (IR. 78, IIR. 103, 105)(4) the court felt that the respondent might possibly be prejudiced by the absence of his chief counsel; (IR. 80)(5) there was a possibility of adverse publicity concerning this case; (IIR 107)(6) the forceable removal of Mr. Wagner by the court during his proffer of evidence created a situation where it was a manifest necessity to declare a mistrial. (IR 80).

On February 23, 1973, Mr. Meldon moved to withdraw as counsel for the respondent (IR 56). A hearing was held on the motion, (IIIR 112-114) and the motion was granted on February 23, 1973. (IR 57) On February 26, 1973, the respondent moved to dismiss the indictment, on the grounds that his right to counsel, and to not be twice placed in jeopardy, precluded retrial. (IR 63-70). The respondent also moved to have his counsel, Maurice Wagner, reinstated. (IR 58-62). Both motions were denied, (IR 76-81) and on April 17, 1973, the defendant, without assistance of counsel was retried and convicted of both counts charged. (IR 148). Over general objections by defense counsel that the respondent's record was a good one [IVR 5-7], the Court fixed sentence at five years on each count to run concurrently [IVR 7-8; IR 149]. An appeal notice was timely filed by the defendant [IR 150].

Pursuant to the Fifth Circuit Court of Appeals Rule 7, Fifth Circuit Plan Under the Criminal Justice Act an attorney, Fletcher N. Baldwin, Jr., was appointed June 11, 1973 to perfect respondent's appeal. A divided panel of the Fifth Circuit Court of Appeals reversed respondent's conviction (Pet. App. A. pp. 1a-25a). After granting the government's motion for rehearing en banc, the full court affirmed the panel's decision (Pet. App. pp. 26a-28a). The position of the majority of the Appellate Court was that respondent's claim of double jeopardy revolved around two distinct factual issues: first, the threshold issue facts of whether on the unique facts of this case the respondent involuntarily waived his right not to be twice in jeopardy; and, second, if it were not respondent's motion, whether the court's declaration of the mistrial was justified by manifest necessity. With respect to the first issue, the panel held that the actions of the trial judge in banishing defendants chief trial counsel and threatening to take disciplinary action against the remaining co-counsel coupled with co-counsel's lack of preparation, court's failure to consider alternatives, and respondent's refusal to be represented by co-counsel Meldon, gave respondent no choice but to move or to accept a mistrial. "Under circumstances of this case . . . Respondent can hardly be said to have relinquished voluntarily his right to proceed before the first jury."

United States v. Dinitz, 492 F.2d 53, 59 (5th Cir. 1974).

In considering the second issue, the panel pointed out that "usually the declaration of the mistrial is extemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result the appellate court normally tests to determine whether the precipitating event created a requisite manifest necessity to abort the trial." On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Because the die was cast with the trial judge's response to the conduct of defense counsel, the panel held that appellate review must be focused on Wagner's expulsion rather than on the subsequent declaration of a mistrial. The panel then concluded that means of dealing with Wagner's conduct short of excluding him from the trial had been available to the trial judge, and that these alternatives should have been but were not considered. Thus, in the view of the majority of the panel, as affirmed, en banc, the action of the trial judge in excluding Wagner, threatening Meldon, and refusing to consider alternatives was an abuse of discretion, and the sua sponte mistrial barred renewed prosecution of respondent.

A dissenting member of the panel, and the dissenting members of the en banc opinion, assumed for the purposes of argument that the trial judge had erred in excluding

respondent's counsel, but rejected as too extreme to be workable, the majority views that the judge's declaration of a mistrial operated to bar respondent's subsequent trial. The dissenting judge, noting that after reviewing the record, his determination of the facts showed that the motion for mistrial was voluntarily made and therefore the court should have considered the judicial over-reaching standard, and not the abuse of discretion standard.

ARGUMENT

The petition presents no question warranting review by this Court. The petition makes a basic assumption that the mistrial flowed directly from the defense motion (Pet. II). The court below sitting as a panel and then en banc disposed of this factual issue by concluding that the defendant was not the cause of the mistrial, but it was the judge who created the error that resulted in the mistrial. It was the judge who failed to consider alternatives to the mistrial and it was the judge who created an atmosphere so adverse to defendant that he could not proceed with his case. Thus, the assumption that the mistrial was a direct result of a defense motion ignores the facts as presented in the record. The petitioner's position can be summed up as follows: (1) minor misconduct of defense counsel is not grounds for banishing counsel from the courtroom (Pet. 14); (2) minor misconduct of defense' counsel is not grounds for a mistrial (Pet. 12-13)(3). Therefore, minor misconduct of defense counsel is grounds for banishing counsel and declaring a mistrial. (Pet. 15). The logic of petitioner's position ignores the careful development of the unique facts of the instant case by the court below. As pointed out by that court, sitting en banc, the path to mistrial was paved by the actions of the trial judge, not by the respondent or his lead counsel. United States v. Dinitz, 504 F.2d 854 (5th Cir. 1974) (en banc).

See also McKissick v. United States, 379 F.2d 754 (5th Cir. 1967). As this court noted in Brown v. United States, 356 U.S. 148, 153 (1958), "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

The Petitioner argues that the mistrial waived defendant's Fifth Amendment right not to be placed twice in jeopardy because the mistrial was a direct result of a defense motion (Pet. II). A waiver, however, is the voluntary relinquishment of a known right. It is submitted that the act of Mr. Meldon in moving for a mistrial could hardly be considered voluntary, and since it was by that time clear that the trial could not reasonably continue, the motion did not relinquish a known right of the defendant and therefore United States v. Jorn, 400 U.S. 470 (1971) is inapplicable. As the Fifth Circuit panel noted: "Proceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal." United States v. Dinitz, 492 F.2d at 58. On this point the petitioner seems to agree. (Pet. 14).

The trial court was under a duty to clearly determine whether there had been a proper waiver of the respondent's constitutional right, Johnson v. Zerbst, 304 U.S. 458 (1938); United States v. Aurbach, 420 F.2d 921 (5th Cir. 1969); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), especially in light of the fact that the circumstances leading

to the mistrial were created by the court in its unreasonable use of removal powers. The petitioner fails to recognizes that the court had the option of reconsidering Wagner's conduct and warning, holding in contempt and/or petitioning the disciplinary committee of the state bar association to investigate his conduct. Any action that would have preserved the integrity of the guilt-determining process should have been followed before taking the drastic action of removing the lead counsel and aborting the trial. Furthermore, once it appeared to the court -- and it is clear from the record -- that there were irreconcilable differences between the respondent and Mr. Meldon, the trial court was under a duty to inquire into that conflict. Glasser v. United States, 315 U.S. 60 (1942); United States v. Mitchell, 138 F.2d 831 (2d Cir. 1943); Brown v. United States, 264 F.2d 363 (D.C. Cir. 1958). A motion for a mistrial, bottomed upon explicit threats to the attorney and his client, can hardly be considered a voluntary waiver by the defendant. See McKissick v. United States, 379 F.2d 754 (5th Cir. 1967). Indeed, the facts are clear, it was the effect of the trial court's action sua sponte, that created the point of no return for the respondent.

The mistrial resulted when the trial judge refused to consider alternative methods of control over an attorney he considered errant. The trial judge did not consider the damage to the respondent or the criminal justice system that

the forceable removal of his retained chief counsel created.

In the instant case, the respondent has stated, under oath, that he never consented to a mistrial (1 R. 63-65). The record clearly shows that Mr. Meldon was no longer involved in representing the respondent's best interests (1 R. 78-80; 11 R. 103, 100, 103, 104, 105). The court was well aware of Mr. Meldon's position (1 R. 80; 11 R. 103-104), and the record is otherwise silent as to any direct inquiry of the respondent by the court in order to determine his wishes with regard to a mistrial.

From the facts the court below correctly concluded that the mistrial was not of respondent's doing, see also United States v. Walden, 448 F.2d 925 (4th Cir. 1971), and indeed was the proximate and foreseeable result of the actions of the trial judge with regard to his treatment of Mr. Wagner and Mr. Meldon. Thus the only other possibility opened to the court would have been to consider, as suggested by the petitioner, whether a manifest necessity existed.

The doctrine of manifest necessity states that where a jury cannot reach a free and fair verdict, the trial ought to be stopped. See, e.g., United States v. Perez, 9 Wheat. 579, 580, 22 U.S. 256 (1824); Downum v. United States, 372 U.S. 734 (1963) and Illinois v. Somerville, 410 U.S. 458 (1973). The majority of the panel in United States v. Dinitz, 492 F.2d 53, 57-61 (5th Cir. 1974), has set forth an exceptionally well reasoned analysis of the impact of the double jeopardy

provisions and manifest necessity upon the complex and unique facts of the instant case, concluding that a manifest necessity did not exist: "This record contains no intimation that the trial judge thought the jury had been prejudiced by Wagner's mistakes of conduct up to the time they were excused upon the government's objection to the phone call statement." Id. at 60. That analysis was adopted by the majority of the Fifth Circuit sitting en banc.

If this court were to grant certiorari in the instant case the question of manifest necessity would require that this court focus on the trial and the factual circumstances surrounding the forceable removal of Mr. Wagner. That has been done by two appeals panels. Both concluding that from the facts a manifest necessity did not exist. As the petitioner notes, however, it is clear that a trial court has the discretion, within constitutional limits, to declare a mistrial on its own motion, and thus subject a defendant to re-prosecution. Illinois v. Somerville, supra. Furthermore, in the instant case, the trial court by relying on the "manifest necessity" doctrine in support of its declaration of a mistrial (I.R. 80), admits the possibility that the declaration was sua sponte and not the result of Mr. Meldon's motion (1 R. 77, 11 R. 109-110). If, from the record, the motion for a mistrial was sua sponte, the trial court went far beyond the scope of its discretion. Suppose

the trial judge had, on his own motion, dismissed the jury instead of defense counsel? And suppose further that the dismissal of the jury resulted from alleged "baiting" of the judge by a juror. Before suggesting a mistrial, it is undoubtedly true that a necessity would have to exist at the time the jury was dismissed. Could they reach a verdict? Were there other avenues open to the judge to discipline an unruly juror? If the judge had over-reacted, and if the record demonstrated that the original jury could have reached a fair verdict, then the dismissal resulted in double jeopardy, barring subsequent prosecution.

The government in the hypothetical might argue that the alternatives open to the defendant took the case out of the double jeopardy class. That is, the defendant could have concurred in the mistrial or waived his right to a jury trial. But those are not alternatives at all. The court had already acted to the detriment of the defendant and cannot expect the defendant to retroactively relieve the court of the consequences of its act.

At the time of the removal of Mr. Wagner and the explicit threats to Mr. Meldon, there was not even the hint of a manifest necessity to abort the trial. The jury had in no way been influenced by the exchange between the court and Mr. Wagner since, if for no other reason, the jury was out of the courtroom most of the time. United States v. Dinitz, 492 F.2d at 60. The alleged

misconduct of Wagner precipitating the mistrial was his anticipated statement concerning an extortion attempt made against the respondent. The other improper act attributed to Mr. Wagner was his interjection of his opinion before the jury concerning the credibility of a government witness. It should be reemphasized that just prior to that comment the United States attorney had interjected his own opinion as to the guilt of the defendant (11 R. 71). Mr. Wagner's comment resulted in a strong rebuke by the court (11 R. 72-73), yet the prior personal observation to the jury by the government passed without comment by the trial judge.

In the government's Petition the question is suggested, what should the trial judge have done to avoid the double jeopardy, once Mr. Wagner had been banished and Mr. Meldon intimidated? It is respectfully suggested that the experienced trial judge should not have reached those crossroads. Once there, the trial judge could still have reinstated Mr. Wagner to conduct the defense or allowed the defendant to pursue his appeal to the circuit court at that time (1 R. 87, 111).

The government suggests in footnote six of its petition (Pet. 13) that as a practical matter the relinquishment of the first enpaneled jury created very little harm. The double jeopardy provision, however, guarantees the right

of a defendant to complete his trial before a particular jury and without the ordeals of time, expense and emotional impact balanced against society's interest in the fair administration of justice. Illinois v. Somerville, supra. The Fifth Amendment will not permit jury shopping. Furthermore, no societal interest can be served by granting trial judges the unbridled power to summarily remove attorneys from cases for proffering evidence, even if that evidence is ruled inadmissible.

> It has been repeatedly held that, whether the discharge of a jury arose from the arbitrary act of the court, or from some mere whim or caprice of judge or jury, or from some accident or blunder, it was immaterial; in either case the result would be the same -- the discharge of the defendant. State v. Turpin, 54 Or. 367, 103 Pac. 438 (1909).

There are a few cases where a mistrial has been declared because of the alleged misconduct of defense counsel. In those cases, the reprosecution of the defendant has consistently been barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution and thus are not inconsistent with the ruling below in the instant case. See United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953); State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937); Lillard v. Commonwealth, 267 S.W. 2d 712 (ky. 1954).

In every case where a mistrial has been declared without the consent of the defendant, and reprosecution permitted, the mistrial was declared because the jury could no longer

reach a fair verdict. Where reprosecution has been barred, it has been so because the first jury was dismissed while it was still capable of reaching a fair verdict. In the instant case, it is respectfully urged that the comments of Mr. Wagner, which the jury never heard, could in no way have prevented that jury from reaching a fair verdict; therefore, reprosecution of the respondent in the instant case placed him in jeopardy. Thus Petitioner's reliance upon Illinois v. Somerville, is misplaced and had the court below held otherwise it would have in effect permitted the trial court to do in two steps what it could not constitutionally do in one. It would in fact have sanctioned the trial court's act of subjecting the respondent to multiple re-prosecutions, until such time as the defendant either was represented by counsel approved by the trial judge; or until the respondent retained counsel who would neither make any objectionable comment before the jury, nor proffer inadmissible evidence. As the court below suggested, that cannot be. See also, In re McConnell, 370 U.S. 230 (1962); Davis v. State, 291 So. 2d 346 (Ala. 1974). In the instant case there is not even a suggestion by the trial court that the original jury would have been unable to reach a just verdict, that a juror was biased, nor that there was an emergency that might necessitate aborting the trial. There is no evidence that the mistrial was necessitated by the defendant's abuse of the judicial system, nor that it was declared in the sole interest of the

respondent, nor that there was any compelling state policy to be implemented by the declaration of a mistrial. Rather, the mistrial was declared because of alleged misconduct by the retained chief defense counsel, and his resultant expulsion from the case leaving the defendant with a Hobson's choice of affirming the court's unconstitutional act or proceeding without counsel of his choosing. The choice was no choice at all. Thus, as held by the court below, the action of the trial judge rendered respondent unable to conduct his defense and therefore the second trial placed him twice in jeopardy in violation of the Sixth Amendment. Thus it is clear that there is no inconsistency in the holding of the court below and decisions of this court, especially United States v. Jorn supra and Illinois v. Somerville supra. The petitioner has failed to construct a proper foundation upon which to build a case that would be supported by Jorn and Summerville.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition has been furnished by United States mail to Robert H. Bork, Esquire, Solicitor General of the United States Office of the Solicitor General, Washington, D.C. 20530, this 20th of February, 1975.

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Supreme Court, U. S.
FILED
JUL 5 1975
MICHAEL RODAK, JR., CLERK

No. 74-928

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

NATHAN GEORGE DINITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A, 1a-25a) is reported at 492 F. 2d 53. The *per curiam* opinion of the court of appeals *en banc* (Pet. App. B, 26a-28a) is reported at 504 F. 2d 854. The opinion of the district court (Pet. App. D, 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals *en banc* (Pet. App. C, 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including January 26, 1975 (a Sun-

day). The petition for a writ of certiorari was filed on January 27, 1975, and was granted on March 31, 1975 (App. 45). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who has moved for and been granted a mistrial may prevent renewed prosecution on the ground that an unintentional error committed by the court at trial rendered his motion involuntary and that the court's granting of his motion did not satisfy the manifest necessity test.

2. Whether a court's declaration of a mistrial, manifestly necessary when made, may nevertheless bar renewed prosecution because the error creating the need for the mistrial may not itself have been manifestly necessary.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

1. In an indictment returned in the United States District Court for the Northern District of Florida on December 6, 1972, respondent Nathan George Dinitz and another were charged with having conspired to distribute a Schedule I controlled substance (LSD) and with having distributed such substance, in violation of 21 U.S.C. 841(a)(1).[1] Respondent initially retained Jeffrey Meldon to represent him. Meldon appeared with respondent at the arraignment and subsequently filed several pretrial motions. Approximately five days before trial, respondent retained Maurice Wagner as his trial counsel, although Meldon continued to do "investigation into the case" (App. 34). Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the day of trial the court allowed him to appear *pro hac vice* on respondent's behalf. Meldon was also present as counsel of record at trial, as was Fletcher Baldwin, a professor of law at the University of Florida. Wagner advised the court at the beginning of trial that Baldwin would "make

[1] Respondent was charged in two counts of a three-count indictment (App. 3–4). Count I of the indictment—the conspiracy count—did not specify the precise conspiracy statute violated, although it is apparent that the intent was to charge the conspiracy as a violation of 21 U.S.C. 846. The court of appeals in fact stated that respondent was so charged (Pet. App. 1a). Respondent has not challenged this omission at any point in the proceedings, and there is consequently no need for this Court to consider it. *Lawn* v. *United States*, 355 U.S. 339, 362–363 n. 16. In any event, the indictment fairly informed respondent of the conspiracy charge against which he was required to defend himself and would have enabled him to plead an acquittal or a conviction in bar of any future prosecution for the same offense. *Hamling* v. *United States*, 418 U.S. 87, 117; *Eisner* v. *United States*, 351 F. 2d 55, 56–57 (C.A. 6), certiorari denied, 369 U.S. 859. Moreover, in light of the concurrent five-year sentences respondent received on Counts I and III, the absence of a reference in Count I to the conspiracy statute violated cannot have prejudiced him. *Barnes* v. *United States*, 412 U.S. 837, 844.

the arguments with regard to the law and I [Wagner] will try the facts * * *" (App. 5).[2]

Since the government's case against respondent depended largely upon the testimony of undercover agent Steve Cox concerning the circumstances of his purchase of LSD from respondent, Wagner's trial strategy was to attack Cox's credibility. Wagner began immediately to implement this strategy by attempting to suggest at the outset of his opening statement that respondent had been "set up" by the sale to Cox for a subsequent extortion attempt.[3] Wagner apparently hoped that the jury would infer from this suggestion either that Cox was the extortionist or that he had played some part in the extortion scheme (App. 39).[4]

[2] Prior to this clarification of the respective responsibilities of respondent's three retained attorneys, Meldon and Wagner alternately spoke on respondent's behalf (Tr. 3–44).

[3] The government's opening statement (App. 18–19) informed the jury that the case was relatively simple and that only two witnesses would be called to prove the charges against respondent—Steve Cox, who was to testify concerning his purchase of drugs from respondent, and the chemist who analyzed the substance purchased by Cox from respondent and found it to be lysergic acid diethylamide (LSD).

[4] Approximately one week after his arrest respondent had reported to the Federal Bureau of Investigation that he had received a telephone call from someone offering to arrange for all charges arising from the sale to Cox to be dropped if respondent would pay the caller a sum of money. With the Bureau's cooperation, an envelope was filled with paper and placed at the appointed pick-up spot. A man was observed picking up the envelope, but the Bureau was unable to apprehend him—although it was able to confirm that the man bore no resemblance to Cox (App. 39–40). No evidence linking Cox to the attempted extortion was ever developed.

After Wagner introduced himself and his co-counsel to the jury, the following colloquy ensued concerning his tactics in challenging Cox's credibility (App. 20):

> MR. WAGNER: * * * After working on this case over a period [of] time it appeared to me that if we would [have] given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—
>
> MR. REED [Attorney, Department of Justice]: Your Honor, we object to personal opinions.
>
> THE COURT: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions. Proceed, Mr. Wagner.
>
> MR. WAGNER: Thank you, Your Honor. I call this the Case of the Incredible Witness.

The government again objected (*ibid.*). The court sustained the objection, had the jury removed, and admonished Wagner (App. 20–21).[5]

At a later point in his opening statement, Wagner renewed his attack on Cox. The court again had the jury removed and warned Wagner a second time (App. 22). After the jury had returned, Wagner began to recite what the evidence would show up to the time of respondent's indictment and arrest. He quickly returned to the suggestion that Cox had been

[5] Wagner had also annoyed the court at a pretrial hearing by unduly prolonging his argument in support of a motion to suppress that the court considered "obviously frivolous" (App. 21).

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involved in an attempted extortion, however, stating that "[s]ome week or ten days later Nat [Dinitz] began to get telephone calls offering—" (App. 29). At the government's request, the jury was once more removed and the court pressed Wagner for evidence of some connection between the extortion attempt and Cox. When Wagner was unable to offer any such evidence, the trial judge ordered him to leave the courtroom (App. 29–32).

After Wagner had left the courtroom and Meldon had disclaimed any responsibility for the substance of Wagner's opening remarks (App. 33–34), the judge asked Meldon whether he was prepared to assume the lead in trying the case. Meldon responded that he was not since he had not discussed the case with any of the witnesses or otherwise prepared for trial. He further stated that he was reluctant to proceed in the face of respondent's desire to have the case tried by Wagner. The judge thereupon recessed the trial until the following morning, instructed Meldon to prepare to proceed at that time, and indicated that he would consider the entire matter overnight (App. 34–36).

In chambers the following morning, Meldon again stated that respondent did not want him to try the case and that he felt that he "would not be able to give [respondent] a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening remarks * * *" (App. 37–38). Meldon also stated that in his opinion, and in the opinion of co-counsel Baldwin, the court's refusal to permit Wagner to continue as respondent's trial counsel "was well within the discretion of the Court

and would not be reversed by the Court of Appeals" (App. 37) and that he intended to advise respondent to move for a mistrial (*ibid.*).

The judge then reviewed the events of the preceding day and summarized the considerations that had led him to order Wagner's exclusion. He noted that while Wagner had not in his opening statement been permitted fully to discuss the alleged extortion attempt involving respondent, he had suggested that respondent had been the victim of some sort of conspiracy and had made other improper remarks (App. 38–39).[6] He observed further that Wagner had persisted in his efforts to inform the jurors of the extortion attempt, despite the absence of any evidence linking the attempt to undercover agent Cox and despite the court's repeated admonitions against such statements to the jury (App. 39–40). He also noted that an unusually large number of persons, including members of the news media, had appeared for the trial and that he was concerned that the interest of many of those persons was attributable to a local news story to the effect that when the case was tried "there was going to be a shocking matter that the public would hear of" (App. 40). The judge stated that he could only assume that the "matter" referred to in the local media was the alleged extortion attempt directed at respondent (*ibid.*).

[6] Among other things, Wagner had suggested (App. 29) that respondent's arrest had been an "afterthought," effected only after the police had failed to locate another of the boarders at the house where respondent lived. In fact, however, Wagner knew that respondent had been indicted prior to his arrest (Pet. App. 33a).

The judge also set forth some of the alternatives available to respondent and to the court (App. 38–39). He stated that because of Wagner's misconduct and the inferences the jury might draw from being sent out of the courtroom so many times during Wagner's opening statement and from Wagner's absence from the trial, he was "seriously considering granting a mistrial * * *" (App. 40). The judge requested that counsel for respondent consider the available alternatives with respondent and advise the court of respondent's wishes. He also suggested that the government consider the advisability of consenting to the declaration of a mistrial and of retrial at a later date "when there is a possibility that this widespread publicity would not permeate the atmosphere" (App. 40–41).

Following a short recess, Meldon moved for the declaration of a mistrial on respondent's behalf. Respondent's position was explained to the court as follows (App. 41):

> MR. MELDON: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

The government did not oppose respondent's motion, and the court announced (App. 42):

> Then I am going to declare a mistrial, gentlemen. I think that under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Prior to his second trial, respondent moved to dismiss the indictment on the ground of double jeopardy and, alternatively, to have Wagner permitted to reenter the case. Both motions were denied by the trial court (Pet. App. 31a–37a). Respondent, a third-year law student, proceeded at his second trial *pro se* and was convicted on both of the counts in which he was charged. He was sentenced to concurrent terms of five years' imprisonment.

2. A divided panel of the court of appeals reversed respondent's conviction (Pet. App. 1a–25a). After granting the government's motion for rehearing *en banc*, the full court affirmed the panel's decision in a brief *per curiam* opinion, with seven judges dissenting (Pet. App. 26a–28a).

According to the two judges who comprised the majority of the panel, respondent's claim that his retrial was barred by the Double Jeopardy Clause involved two relatively distinct issues: first, the "threshold" issue whether respondent's motion for a mistrial was voluntarily made; and, second, if it was not voluntarily made, whether the court's declaration of a mistrial was justified by "manifest necessity." With respect to the first issue, the panel held that the actions of the trial judge in banishing Wagner and threatening to take disciplinary action against Meldon (App. 33–34), coupled with Meldon's lack of preparation and respondent's refusal to be represented by him, gave respondent "no choice but to move for or

accept a mistrial. Under the circumstances of this case * * * [respondent] can hardly be said to have relinquished voluntarily his right to proceed before the first jury" (Pet. App. 13a–14a).

With respect to the "manifest necessity" issue, the panel pointed out (*id.* at 12a):

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial.

On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Instead, because the "die was cast with the trial judge's response to the conduct of defense counsel," the panel held that appellate review was appropriately focused on Wagner's exclusion rather than on the subsequent declaration of a mistrial (*ibid.*). The panel then concluded that means of dealing with Wagner's misconduct short of excluding him from the trial had been available to the trial judge and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, the action of the trial judge in excluding Wagner, when measured by the "manifest necessity" test, constituted an abuse of judicial discretion and barred renewed prosecution of respondent.

The dissenting member of the panel assumed for purposes of argument that the trial judge had erred

in excluding Wagner. But he rejected as mistaken in light of decisions of this Court and, in any event, as "too extreme to be workable," the majority's view that that "error" and the trial judge's granting of respondent's motion for a mistrial operated to bar respondent's subsequent trial (Pet. App. 24a). The test mandated by decisions of this Court, in the view of the dissenting member, was whether the expulsion of Wagner constituted "judicial overreaching"—not whether it was an abuse of discretion (*id.* at 21a). And just as the majority had expressly declined to "characterize the trial judge's actions as judicial overreaching" (*id.* at 13a), so the dissenting member found no evidence of judicial impropriety (*id.* at 23a). The dissent concluded that, by presenting trial judges with the specter of the bar of double jeopardy for errors not attributable to overreaching, the panel's decision would "give rise to much reluctance in granting mistrials" (*id.* at 24a).

SUMMARY OF ARGUMENT

1. The court of appeals' holding in this case departs significantly from the standards that have been announced by this Court to govern application of the constitutional guarantee against double jeopardy. Even if it is conceded that the trial court erred in excluding one of respondent's trial attorneys and that that error figured prominently in respondent's decision to move for a mistrial, a subsequent trial would have offended the Double Jeopardy Clause only if the error complained of also constituted "judicial overreaching"—that is, if the trial judge's action had been

designed to avoid an acquittal by the jury then impaneled. The court refused to hold that the trial judge's action in this case constituted "judicial overreaching," and we submit that the court should have concluded its inquiry at that point and affirmed respondent's conviction.

2. By focusing on the "voluntariness" of respondent's decision to move for a mistrial, the court introduced an entirely new concept into the law of double jeopardy. It is difficult to conceive of a case in which an error committed at trial by the court or the prosecutor, of a type regarded as sufficiently prejudicial to justify the declaration of a mistrial on motion of the defendant, will not have influenced the defendant's decision to seek to end the trial prior to verdict. The decision made by respondent to move for a mistrial certainly was no less "voluntary" than have been similar decisions made by defendants in countless other cases—decisions which have been influenced by prejudicial, though inadvertent, error not attributable to the defense. Indeed, if respondent's decision to move for a mistrial was influenced by error at all, it was an error brought about in significant part by defense misconduct. The effect of the court's decision in this case is greatly to expand the scope of the traditional barriers to renewed prosecution. We submit that such expansion is warranted neither by decisions of this Court nor by an identifiable constitutional or jurisprudential policy.

3. The court of appeals' decision also gravely distorts the standard evolved by this Court for assaying

the propriety of a mistrial declared by a trial court on its own motion. The court applied the test of "manifest necessity" not to the means adopted to deal with the effects of trial error but to the error itself. By definition, however, the commission of error is never "manifestly necessary"; and a test which thus focuses on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered sacrifices the public's interest in fair trials ending in just judgments in the name of unattainably error-free trials. As a practical matter, moreover, we believe that the court's decision will seriously impair the utility of a procedural device—the mistrial—designed as much to protect the criminal accused as to benefit society. Rather than be told by an appellate court that an unintentional error on its part precludes retrial, many trial judges can be expected to adopt the safer course of routinely denying defense motions for mistrial even in the wake of clear error precluding a fair consummation of the trial.

ARGUMENT

I. IN THE ABSENCE OF JUDICIAL OR PROSECUTORIAL OVERREACHING, THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT BAR THE REPROSECUTION OF A DEFENDANT WHO HAS MOVED FOR AND BEEN GRANTED A MISTRIAL

The Fifth Amendment provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb * * *." A number of related policies are subsumed in this constitutional

guarantee. Principles of fairness and finality require that once a person has been convicted and punished for a particular offense he shall not be required to run the gantlet again for the same offense or to suffer multiple punishments. *Ex parte Lange,* 18 Wall. 163; *In re Nielsen,* 131 U.S. 176. Similarly, when a person has been fairly acquitted of an offense, the Double Jeopardy Clause provides assurance that he shall not be made subject to repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187–188.

But the fact that a person has once been placed in jeopardy does not mean that reprosecution is barred under all circumstances. If a defendant succeeds in having his conviction overturned on direct appeal, for example, he does not enjoy any protection against reprosecution. *E.g., Forman* v. *United States,* 361 U.S. 416; *Bryan* v. *United States,* 338 U.S. 552; *Stroud* v. *United States,* 251 U.S. 15; *United States* v. *Ball,* 163 U.S. 662; see also *United States* v. *Jorn,* 400 U.S. 470, 484. The same rule applies if the defendant's conviction is overturned as the result of a successful collateral challenge. *United States* v. *Tateo,* 377 U.S. 463. The principal reasons for holding that the Double Jeopardy Clause does not bar reprosecu-

tion in these circumstances has been explained as follows (*id.* at 466):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. * * *

In cases such as the instant one, in which a criminal trial has been terminated prior to verdict, similar considerations have been invoked in determining the permissibility of retrial. In *United States* v. *Jorn, supra,* 400 U.S. at 485, Mr. Justice Harlan stated in his plurality opinion:

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-

> prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.[7]

This result proceeds logically, indeed inescapably, from the rule permitting retrial following reversal of a defendant's conviction either on direct appeal or in a collateral proceeding. The interest of both the individual defendant and society are well served by a procedural device—the mistrial—that provides an incentive to identify prejudicial error as soon as possible and a means for dealing with that error short of requiring the defendant to proceed to verdict in the face of perceived prejudice (see *United States* v. *Tateo, supra,* 377 U.S. at 468, n. 4).

If retrial were barred after declaration of a mistrial on motion of the defendant but permitted following the defendant's successful appeal, trial courts could be expected to reject such motions in the vast majority of cases. While any verdict of conviction rendered in such a case would be vulnerable to reversal if an appeal were taken, society would at least avoid paying the high price of granting "every accused * * * immunity from punishment because of any defect sufficient to constitute reversible error * * *" (*United*

[7] None of the opinions in *Jorn* expressed disagreement with this fundamental proposition, which has also been stated in many court of appeals' decisions. *E.g.*, cases discussed in n. 19, *infra;* see also *United States* v. *Goldstein*, 479 F. 2d 1061, 1066 (C.A. 2), certiorari denied, 414 U.S. 873; *United States* v. *Pappas*, 445 F. 2d 1194, 1200 (C.A. 3), certiorari denied *sub nom. Mischlich* v. *United States*, 404 U.S. 984; *Gregory* v. *United States*, 410 F. 2d 1016, 1018 (C.A.D.C.), certiorari denied, 396 U.S. 865; *United States* v. *Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937.

States v. *Tateo, supra,* 377 U.S. at 466). But such a rule would itself involve substantial and unnecessary costs, both to the criminal defendant and to society. The defendant would be forced to proceed to verdict in the face of grave and immediate prejudice and to resort to an appeal in the event of conviction in an effort to cure the error of the court or prosecutor. He would then be subject to retrial, many months after his original conviction. Society, on the other hand, would be forced to devote its resources to a proceeding little short of a charade in an effort ultimately to secure a just verdict. See *Illinois* v. *Somerville,* 410 U.S. 458, 469.

It is also true, of course, as this Court has recognized, that the termination of a trial prior to verdict is not a step to be lightly undertaken. The Double Jeopardy Clause affords every criminal defendant a "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter,* 336 U.S. 684, 689); the corollary of this right is a duty on the part of the court and the prosecution to refrain from intentionally bringing about a mistrial—or, put another way, from depriving the defendant "of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal" (*United States* v. *Jorn, supra,* 400 U.S. at 484). Thus, it has been said that reprosecution of a defendant after the declaration of a mistrial, even on the defendant's motion, is not permitted if the mistrial has been brought about "by judicial or prosecutorial impropriety designed to avoid an acquittal * * *" (*id.* at 485, n. 12). On the other hand,

if the court declares a mistrial *sua sponte*, and over the defendant's objection,[8] reprosecution is not permitted unless the court's decision to abort the proceedings was justified by "manifest necessity" or the "ends of public justice." *Illinois* v. *Somerville*, *supra*, 410 U.S. at 469; see also *United States* v. *Perez*, 9 Wheat. 579.[9]

The differences in the standards applied by this Court in measuring the propriety of prosecution after declaration of a mistrial by the court *sua sponte*

[8] While a defendant need not in every case have objected expressly to the declaration of a mistrial in order successfully to claim the benefit of the "manifest necessity" test, the general rule appears to be that if a defendant had ample opportunity to object but did not do so, that fact will weigh heavily in favor of an ultimate finding of consent. See, *e.g.*, *United States* v. *Goldstein*, *supra*, 479 F. 2d at 1066–1068 (C.A. 2); *Roberts* v. *United States*, 477 F. 2d 544, 545–546 (C.A. 8); *United States* v. *Pappas*, *supra*, 445 F. 2d at 1199–1200 (C.A. 3); *United States* v. *Phillips*, 431 F. 2d 949, 950–951 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355–356 (C.A.D.C.), certiorari denied, 344 U.S. 879; *Conner* v. *Deramus*, 374 F. Supp. 504, 507–509 (M.D. Pa.); but see *Galloway* v. *Beto*, 421 F. 2d 284, 288 n. 4 (C.A. 5), certiorari denied, 400 U.S. 912; *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860.

[9] The first case in which this Court held reprosecution prohibited by the Double Jeopardy Clause after the declaration of a mistrial was *Downum* v. *United States*, 372 U.S. 734. At issue in *Downum* was a mistrial declared after the prosecutor had discovered that one of his key witnesses was not present for trial. Relying on *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9), the Court analogized the situation in *Downum* to a case in which the prosecutor discovered after trial had commenced that he had insufficient evidence to convict. See also *United States* v. *Glover*, 506 F. 2d 291 (C.A. 2). The general approach of *Cornero* had been rejected as too rigid in *Wade* v. *Hunter*, *supra*, 336 U.S. at 691, in a discussion cited approvingly in *Illinois* v. *Somerville*, *supra*, 410 U.S. at 462.

and after declaration of a mistrial on motion of the defendant or with the defendant's consent stem from the crucial fact that in the one case it is the defendant who has exercised an option not to submit his case to the jury then impaneled, whereas in the other that option has been taken from him by the court (see *United States* v. *Jorn*, *supra*, 400 U.S. at 484).

Thus, if the defendant has been given an opportunity to object to the declaration of a mistrial but has chosen not to do so, or if, as here, the defendant has himself requested a mistrial, he thereby necessarily indicates that his interest in securing what may be a conclusive determination in his favor from the jury then impaneled is outweighed by countervailing interests.[10] By its very nature, the ultimate decision made by the defendant in this regard is never free of external influences; it is inevitably the product of competing considerations over which the defendant cannot have complete control. But unless the decision has been foreordained by conscious wrongdoing on the part of the court or prosecutor, designed to avoid an acquittal by the jury then impaneled, "the public's interest in fair trials designed to end in just judgments" (*Illinois* v. *Somerville*, *supra*, 410 U.S. at 470, quoting from *Wade* v. *Hunter*, *supra*, 336 U.S. at 688–689) requires the defendant to make that decision

[10] Generally, these interests will center upon the desire to avoid conviction by a jury after a seriously flawed trial, with the attendant adverse publicity and probable need to undergo a second trial, or the risk that the error ultimately will be deemed insufficient to void a conviction.

and permits retrial in the event he seeks or acquiesces in a pre-verdict termination of his trial.

In the present case, the court of appeals departed significantly from the standards that have been evolved by this Court to govern application of the guarantee against double jeopardy after a mistrial declared in response to a defense motion. As noted earlier, the majority of the panel and of the court of appeals *en banc* expressly declined to characterize the trial judge's action as "judicial overreaching" (Pet. App. 13a, 26a). Neither has respondent suggested that the trial judge acted in bad faith—that is, that either the exclusion of one of his trial attorneys or the ultimate declaration of a mistrial were actions "designed to avoid an acquittal" (*United States* v. *Jorn, supra,* 400 U.S. at 485, n. 12). Indeed, the facts of this case foreclose any possibility that the events at the first trial were so motivated. At the point that the trial was terminated, the first witness had yet to be called, and there was virtually no indiction of the likely outcome of the trial.[11]

[11] In contrast to the English rule, which conditions jeopardy upon the entry of judgment of acquittal or conviction, see Archbold, *Pleading, Evidence & Practice in Criminal Cases*, Secs. 598, 603 (35th ed. 1962), it has been held that jeopardy attaches in criminal trials in the federal courts when a jury has been impaneled and sworn (*e.g.*, *Downum* v. *United States*, *supra*) or when the court in a nonjury trial has begun to receive evidence (*e.g.*, *McCarthy* v. *Zerbst*, 85 F. 2d 640 (C.A. 10), certiorari denied, 299 U.S. 610). See *Serfass* v. *United States*, No. 73-1424, decided March 3, 1975 (slip op. 10-11). The highest court of one state has recently concluded that the prevailing federal rules concerning when jeopardy attaches are bottomed upon this Court's rulemaking authority over trials in federal courts rather than upon the Fifth or Fourteenth Amendments and has adopted the recommendation in the Model Penal Code that jeopardy should attach, in jury as well as in nonjury trials, when the first witness is sworn. See *State* v. *Cunningham*, 17 Crim. L. Rep. 2151 (Montana Sup. Ct., decided May 2, 1975); see A.L.I., Model Penal Code, § 1.08(4) (Proposed Official Draft, 1962).

In any event, it seems clear that in the circumstances of this case—in which the first witness had yet to be called—respondent was as a practical matter relinquishing very little of value in moving for a mistrial. The trial to that point was going neither well nor badly so far as the actual evidence was concerned, and the next jury was as likely to be favorably disposed toward him as the one then impaneled. Any prejudice that had occurred, moreover, appears in retrospect to have been rather evenly balanced between the government and the defense. This is not, then, a case like *Downum* v. *United States*, *supra*, in which the mistrial may have operated as a post-jeopardy continuance to permit the prosecution to strengthen its case. Nor is there any reason to believe that if the Double Jeopardy Clause is held not to have barred respondent's reprosecution, the rule of this case will lend itself to prosecutorial or judicial manipulation in favor of the government. See *Illinois* v. *Somerville*, *supra*, 410 U.S. at 464.

Far from disclosing judicial overreaching, the record establishes that the trial judge's decision to exclude Wagner was made only after Wagner had repeatedly ignored the court's clear instructions and had engaged in what the court reasonably regarded as contumacious conduct. As pointed out by Judge Bell in his dissent from the panel's decision in this case, there is strong support in the record for the trial judge's conclusion that Wagner was bent upon a conscious course of baiting the court in the hope of triggering a mistrial (Pet. App. 23a). Within a period of only a few minutes, the trial judge was compelled to excuse the jury three times in order to admonish

Wagner. But despite these repeated warnings, Wagner persisted in the very conduct for which he had been admonished. Most significantly, he continued to attempt to imply in the jury's presence—without any evidentiary support whatever—that the principal prosecution witness had been involved somehow in an extortion attempt directed at respondent.[12]

In these circumstances, we submit that the trial judge was fully justified in excluding Wagner in an effort to preserve the integrity of the proceedings. The court of appeals suggested (Pet. App. 18a) that the trial judge should instead have (1) warned Wagner that he would be cited for contempt if his misconduct continued, (2) actually cited him for contempt and imposed post-trial sanctions for each citation, (3) caused a complaint to be filed with the grievance committee of the state bar association, and/or (4) taken other post-trial steps to prevent Wagner

[12] We do not agree with the statement of the panel majority (Pet. App. 15a–16a) that in excluding Wagner the trial court was reacting to "anticipated," rather than to actual, prejudice. Although Wagner was never permitted fully to discuss before the jury the significance of the alleged extortion attempt directed at respondent, he had succeeded in characterizing the government's case as "The Case of the Incredible Witness" (App. 20), stated that respondent's receipt of certain telephone calls represented the "really * * * unusual circumstances" (App. 29) of the case, and asserted that respondent's arrest had been merely an "afterthought" (*ibid.*). Those comments, coupled with the possible prejudice to respondent from the jury being sent out of the courtroom so many times during Wagner's opening statement and from the publicity surrounding the case, led the court to conclude—we submit with good reason—that the government's as well as respondent's right to a fair trial had been prejudiced (App. 40). See discussion at pp. 4–8, *supra*.

from being admitted to practice before the United States District Court for the Northern District of Florida. But reminding Wagner of the possibility of future punitive action, either through the contempt process or bar disciplinary proceedings, would have done nothing to eliminate from the trial the effects of the misconduct in which Wagner had already engaged and little to provide assurance that he would have conducted himself in the future in accordance with the court's instructions. Similarly, citing Wagner for contempt of court, but deferring imposition of punishment, would not have cured the prejudicial effects of the misbehavior that had already occurred. The court could reasonably have concluded, moreover, that actually citing Wagner for contempt prior to the conclusion of the trial might have rendered him unable to provide respondent with an appropriately vigorous defense.[13]

[13] In support of its holding that the trial court had erred in excluding Wagner, the court of appeals cited *Carsey* v. *United States*, 392 F. 2d 810 (C.A.D.C.), and *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.), for the proposition that the declaration of a mistrial on the ground of defense misconduct "would not be proper except in case of misconduct going to the very vitals of the trial itself" (Pet. App. 17a). Such misconduct is not established, according to the court, unless the trial has been infected with prejudice not curable through a cautionary instruction (*id.* at 16a). But this proposition hardly controls the present case since, unlike the situation in *Carsey* and *Whitlow*, the trial judge did not respond to the prejudice caused by the defense misconduct by declaring a mistrial but by removing the source of that prejudice—Wagner. The court had no reason to believe at that time that a mistrial would have to be declared subsequently (see discussion at pp. 27–30 *infra*). When

This Court need not decide, however, whether the trial court acted properly in excluding Wagner in order to hold that respondent's reprosecution was not barred by the Double Jeopardy Clause. Even if the court's exclusion of Wagner was erroneous, that error does not justify a departure from the standard enunciated in *Jorn, supra,* 400 U.S. at 485, permitting reprosecution after a mistrial declared on motion of a defendant in the absence of prosecutorial or judicial overreaching. We submit that once the court of appeals concluded that in excluding Wagner the trial judge had not been motivated by a desire to avoid an acquittal of respondent, it should have ended its inquiry and affirmed respondent's conviction.

II. THE FACT THAT RESPONDENT'S DECISION TO MOVE FOR A MISTRIAL MAY HAVE BEEN INFLUENCED BY JUDICIAL ERROR IS NOT RELEVANT TO THE ISSUE OF THE PERMISSIBILITY OF HIS REPROSECUTION

In explaining its refusal to apply the "judicial overreaching" standard enunciated in *Jorn, supra,* 400 U.S. at 485, in determining whether reprosecution of

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the trial was terminated, moreover, it was in response to a defense motion.

To the extent that the court of appeals' holding that exclusion of Wagner was error stemmed from the court's view that such a course is never appropriate in the absence of a contemporaneous declaration of a mistrial (see Pet. App. 4a), we submit that such view should be rejected. The court's exclusion of Wagner left respondent with two retained attorneys to represent him and provided at least some chance that the trial could proceed to verdict. With Wagner present, there was good reason to believe that further misconduct—with attending prejudice—was inevitable and that that misconduct ultimately would have made an already unfortunate situation irretrievable.

respondent was barred by the Double Jeopardy Clause, the panel majority focused on the "voluntariness" of respondent's decision to move for a mistrial (Pet. App. 13a–14a):

> Using a defendant's consent to a mistrial to bar his subsequent complaint of double jeopardy implies that he has bound himself to accept an abandonment of the first trial by exercising something more substantial than a Hobson's choice. If a defendant is able to continue the trial even though harmed by prosecutorial or judicial error, but desires to abort that proceeding, he has waived his right to proceed before the jury first selected. In the instant case, however, the actions of the trial judge had the effect of rendering [respondent] unable to conduct his defense. With Wagner excluded and Meldon disabled, [respondent] had no choice but to move for or accept a mistrial. Under the circumstances of this case, * * * he can hardly be said to have relinquished voluntarily his right to proceed before the first jury [footnote omitted].[11]

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[11] In support of this holding, the panel quoted from *United States* v. *Walden*, 448 F. 2d 925 (C.A. 4). In *Walden*, the Fourth Circuit panel had held that the consent of several of the defendants to the declaration of a mistrial had in effect been coerced by the trial judge and that termination of the trial by the judge on his own motion had not been justified by manifest necessity. Prior to the *en banc* decision in the present case, however, the panel decision in *Walden* was superseded by an order of the Fourth Circuit *en banc* (458 F. 2d 36), affirming by an evenly-divided court the decision of the district court that manifest necessity for the mistrial had existed. The full court in *Walden* did not reach, therefore, the issue of consent. Petitions for writs of certiorari were denied *sub nom. Cook* v. *United States*, 410 U.S. 969, and *sub nom. Ard* v. *United States*, 409 U.S. 867.

It is difficult to understand precisely what the court of appeals had in mind in discussing the "voluntariness" of respondent's decision to move for a mistrial and in ultimately holding that decision to have been involuntary. The court failed to offer meaningful standards for determining when a departure from the *Jorn* formulation is appropriate. We submit, moreover, that, properly analyzed, its "voluntariness" standard is entirely inappropriate to the constitutional inquiry and that, even if "voluntariness" might sometimes be pertinent, it was not a proper criterion on the facts of this case.

The error in the court of appeals' analysis would appear to follow *a fortiori* from this Court's decision in *United States* v. *Tateo, supra*. There, the defendant's guilty plea, entered after trial had begun, was subsequently found to have been coerced by certain statements made to his attorney by the trial judge.[13] Prior to the beginning of his second trial, the defendant sought to have the charges against him dismissed on the ground that reprosecution would offend the Double Jeopardy Clause. Although Tateo's first trial had been terminated short of verdict as a result of actual

[13] The trial judge had informed Tateo's attorney on the fourth day of trial that if the jury found Tateo guilty he would impose a life sentence on one of the pending charges and consecutive sentences on the remaining charges. Upon being told of the judge's statement by his attorney and advised that the likelihood of his conviction was great, Tateo changed his plea of not guilty to guilty. In a subsequent Section 2255 proceeding, Tateo's conviction was set aside and he was allowed to withdraw his plea because of the court's finding that the plea had been coerced.

and improper coercion, this Court rejected his contention, stating that if the defendant "had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him" (377 U.S. at 467; original emphasis). This observation would appear to be directly applicable to the instant case.

Moreover, as already noted, it is well settled that reprosecution of respondent would have been permitted had the trial court denied his motion for a mistrial and had his subsequent conviction been reversed on appeal. No identifiable policy is served by the court of appeals' holding that reprosecution is precluded because respondent's first trial ended with the declaration of a mistrial rather than with a reversible or collaterally vulnerable conviction. As this Court noted in *Tateo* (377 U.S. at 467):

> A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.

In any event, it is simply inaccurate to characterize respondent's motion as involuntary on the facts of this case. Like any defendant aggrieved by the occurrence of error during trial, respondent faced a concededly difficult choice between going forward, thereby running the risk of conviction and affirmance on appeal, or relinquishing the right to have his case determined

by the jury then impaneled. But the particular course that he chose—that is, to request termination of the trial prior to verdict—was involuntary only in the sense that he was forced by the exclusion from the trial of one of his attorneys to make a choice at all. Conceding that respondent was called upon to make a choice between stopping the proceedings or going forward, however, his decision to move for a mistrial was by no means inevitable. Respondent could have permitted one or both of his two remaining attorneys to represent him in the trial, and he could have sought a continuance to afford them an opportunity to decide how best to do so.[16] He could also have proceeded for the remainder of the trial *pro se,* which is what he chose to do at his second trial. In either event, he could then have appealed had he been convicted—contending that the trial court committed reversible error in excluding one of his three attorneys.

In weighing these alternatives, respondent was assisted by two competent attorneys of his own choos-

[16] The panel majority discounted this possibility by stating that "[t]he threats to Meldon placed the only remaining trial attorney in the inconsistent position of having to protect his own standing as a member of the bar of the Northern District of Florida against any suggestion of complicity with the line of defense Wagner had begun and of acting as a vigorous and effective advocate on behalf of [respondent]" (Pet. App. 11a). At the same time, however, the panel concluded that the trial court should have more fully considered, among other things, reminding Wagner of the possibility of future disciplinary proceedings against him or actually citing him for contempt (*id.* at 18a). If further conduct of the trial by Meldon was not possible because of possible disciplinary action, we fail to understand why the same was not true with respect to Wagner.

ing. The record also discloses, moreover, that he was given adequate opportunity to consult with his attorneys concerning the alternatives available to him (see discussion at pp. 6–8, *supra*). Moreover, the court of appeals' conclusion that respondent was left with no choice but to move for a mistrial when the trial court excluded Wagner—and that the trial judge should have understood that fact and, accordingly, should have considered Wagner's exclusion in terms of its manifest necessity—ignores at least two critical facts: first, the trial judge had no reason to suspect that respondent, when actually faced with the decision, would refuse to be represented at trial by his two remaining attorneys—one of whom, Meldon, had represented him throughout the pretrial proceedings and was undoubtedly familiar with the critical aspects of the case; and, second, Meldon and Baldwin were prevented from representing respondent for the remainder of the trial because of a conscious choice on respondent's part not to permit them to do so.[17]

Finally, in considering whether respondent's request for a mistrial was "voluntary," we think it

[17] The trial judge cannot fairly be faulted for failing to solicit additional information concerning respondent's likely response to Wagner's exclusion before acting. There is no reason to believe that respondent had finally formulated a response prior to Wagner's actual exclusion and, more importantly, had the judge asked him to do so, respondent would have had such a substantial incentive to suggest that he would not permit his two remaining attorneys to represent him and would therefore be unable to proceed (since such a response would have discouraged the court from excluding Wagner) as to make any response to that question inherently unreliable.

was wholly inappropriate to ignore the role that the defense itself played in creating the circumstances that led to the expulsion of Wagner and the declaration of mistrial. This was not a case in which the defense mistrial motion resulted from errors by court or prosecutor wholly beyond the control of the defense. Since the "dilemma" in which the defense found itself with the expulsion of Wagner was substantially contributed to by what the court of appeals conceded to have been defense misconduct (which, while it may not yet have made a fair trial, for the government as well as the defendant, impossible, had certainly begun to imperil the prospects for one), the court of appeals should not have held the mistrial motion involuntary.[18]

In summary, respondent's decision to move for a mistrial was not a "Hobson's choice"; rather, it represented an effort to pursue what seemed to respondent at the time, in light of the possible consequences

[18] While the broad question is not presented here, it is our position that the Double Jeopardy Clause should not be held, as a general matter, to bar reprosecution whenever a mistrial results from a chain of events for which the defense is responsible in substantial part. In both *Downum* and *Jorn*, the only cases in which this Court has held reprosecution prohibited by the Double Jeopardy Clause after declaration of a mistrial, defense misconduct was not involved in any way in the precipitating events leading to the mistrial. The Chief Justice may have had such a situation in mind, however, when he noted in his concurring opinion in *Jorn* that he would have voted to permit reprosecution there had "the accused * * * brought about the erroneous mistrial ruling * * *" (400 U.S. at 488). See also *Carsey* v. *United States*, 329 F. 2d 810, 815 (C.A.D.C.) ("Under the doctrine of necessity, misbehavior by defense counsel that intrudes on a fair trial permits a mistrial without prejudice to a retrial") (Levanthal, J., concurring).

of continuing with the trial, to be the most advantageous course available. Surely, respondent's decision not to go forward with the trial was substantially more "voluntary" than the decision of the defendant in *United States* v. *Tateo, supra,* to terminate his trial by pleading guilty—a plea subsequently found to have been coerced. Indeed, it is hard to see how respondent's decision to move for a mistrial was any more "involuntary" than that of any other defendant confronted with an error by court or prosecutor that seriously prejudices his prospects for a fair verdict and therefore "compels" him to seek the termination of the trial.[19] Thus, the effect of the court

[19] In countless cases, trial courts have exercised their discretion to declare a mistrial on defense motion made in response to an inadvertent error committed by the court or prosecutor. In each of those cases, the defendant's request for the declaration of a mistrial could be said to have been "involuntary" in the sense that in making the request the defendant reasonably believed that the error had gravely prejudiced his defense. For example, in *Roberts* v. *United States*, 477 F. 2d 344 (C.A. 8), the defense motion for a mistrial was made and granted after the court had inadvertently and erroneously made certain comments that could have been interpreted by the jury as criticism of the trial tactics of an attorney for two of the defendants. In *United States* v. *Kwitek*, 467 F. 2d 1222 (C.A. 7), certiorari denied, 409 U.S. 1079, the defendant's motion for a mistrial was granted after it had become apparent that a summary of the defendant's prior record had been inadvertently sent into the jury room and the jury had looked at it. A mistrial was declared on defense motion in *United States ex rel. Montgomery* v. *Brierley*, 414 F. 2d 552 (C.A. 3), because of the court's conclusion that the defendant had been prejudiced by certain references made by the prosecutor in his closing statements. In *United States* v. *Henderson*, 439 F. 2d 531 (C.A.D.C.), a mistrial was declared on defense motion after the prosecutor announced in the jury's presence that he planned to call the

of appeals' decision in this case is to expand greatly the traditional barriers to renewed prosecution.

The irony of the decision is that, while expanding the scope of the Double Jeopardy Clause, it severely limits the occasions on which declaration of a mistrial would be appropriate—even when such relief is sought by the defendant in the wake of perceived prejudice. If that prejudice was caused by error committed by the court or prosecutor, however inadvertently, retrial following declaration of a mistrial would be precluded in the absence of "manifest necessity" for the mistrial. Consequently, whenever prosecutorial or judicial error could arguably be cured by an instruction to the jury, for example, the court of appeals' decision would require the trial court to reject the defense motion for a mistrial—even if the trial court were to conclude, taking all circumstances into account, that terminating the trial at the defendant's behest would be the fairer course. This result seems to us palpably incompatible with sound principles of judicial administration and with the spirit of the Double Jeopardy Clause as well.

III. IN THE CIRCUMSTANCES OF THIS CASE, THERE EXISTED IN ANY EVENT MANIFEST NECESSITY FOR THE DECLARATION OF A MISTRIAL

Even if it were proper to treat the present case as though the trial court had acted *sua sponte* in declar-

defendant's mother as a rebuttal witness and then failed to do so. In all of the cases discussed above, reprosecution was held not to be barred by the Double Jeopardy Clause.

ing a mistrial, reprosecution of respondent was nevertheless permissible, since termination of the trial was "manifestly necessary" in light of respondent's unwillingness to permit his two remaining trial attorneys to represent him. The governing standard applicable in such circumstances appeared initially as dictum in *United States* v. *Perez,* 9 Wheat. 579. In that case, the Court held that the inability of a jury to agree on a verdict justified the declaration of a mistrial and subsequent reprosecution (*id.* at 580):

> We think, that in all cases of this nature, the law has inves'ed courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.
> * * * [20]

This Court has been required in numerous cases since *Perez* to determine whether a court's *sua sponte* declaration of a mistrial precluded reprosecution. The standard used repeatedly in such cases is that first announced in *Perez*—whether the court's decision to terminate the trial was justified by "manifest necessity" or the "ends of public justice." *E.g., Illinois* v. *Somerville, supra; Downum* v. *United States, supra; Gori* v. *United States,* 367 U.S. 364; *Wade* v. *Hunter, supra; Lovato* v. *New Mexico,* 242 U.S. 199;

[20] See also *Green* v. *United States,* 355 U.S. 184; *Keerl* v. *Montana,* 213 U.S. 135; *Dreyer* v. *Illinois,* 187 U.S. 71; *Selvester* v. *United States,* 170 U.S. 262; *Logan* v. *United States,* 144 U.S. 263.

Thompson v. *United States*, 155 U.S. 271; *Simmons* v. *United States*, 142 U.S. 148.

In *Somerville*, where the issue has been most recently considered, the defendant was brought to trial under an indictment defective under Illinois law. The defect, which was not curable by amendment and which could have been asserted by the defendant to overturn any judgment of conviction, was discovered by the prosecutor before any evidence was introduced—but not before the jury had been impaneled and sworn. Over the defendant's objection, the trial court declared a mistrial. The defendant was subsequently reindicted, tried and convicted. In rejecting the contention that reprosecution was barred by the Double Jeopardy Clause, this Court stated (*id.* at 464):

> While virtually all of the cases turn on the particular facts and thus escape meaningful categorization * * *, it is possible to distill from them a general approach, premised on the "public justice" policy enunciated in *United States* v. *Perez*, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

The panel appeared to concede in its opinion in this case that at the time the declaration of a mistrial was being considered, such a course was justified by "manifest necessity" and the "ends of public justice." According to the panel majority, the court was at that time faced with three possible courses of action: first, it could have required continuation of the trial; second, it could have granted a continuance of sufficient length to permit respondent to employ new counsel; and, third, it could have declared a mistrial (Pet. App. 10a). The panel concluded, however, that "[p]roceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal" (*id.* at 11a). The panel also concluded that granting a continuance so that respondent could secure new counsel would similarly have "failed *Somerville's* 'general approach'" (*ibid.*):

> There would have been a very real probability of prejudice inherent in releasing the jurors to go about their normal affairs in contact with the general public and news media for such a period of time. Sequestering them would have been out of the question. Additionally, the break in the continuity of the trial would poorly serve juror's memories. Most importantly, however, a continuance would saddle [respondent] with the unfavorable inferences the jurors would surely draw from the delay itself and from Wagner's absence at the rescheduled trial.

The court refused to focus its attention on the circumstances that existed at the time the declaration of a mistrial was being considered, however, because

"[t]he die was cast with the trial judge's response to the conduct of defense counsel" (*id.* at 12a). We submit that this conclusion is factually unsupportable and that the significance attached to it by the court in this case represents a radical and unwarranted departure from this Court's holdings in *Perez, Somerville* and related cases.

As noted earlier (see discussion at pp. 27–30, *supra*), the record in this case simply does not support the conclusion that the declaration of a mistrial was made inevitable by Wagner's exclusion. Among other things, respondent could have permitted one or both of his two remaining trial attorneys to proceed on his behalf. If convicted, he could have appealed contending that Wagner's exclusion was error justifying the granting of a new trial. The fact that respondent chose not to proceed reveals only that, after consideration of the available alternatives, he concluded that termination of the trial was, as his counsel stated, "in his best interest" (App. 41).

More importantly, however, we believe that the court of appeals erred in focusing on the trial court's decision to exclude Wagner from the trial rather than on the circumstances that existed at the time the declaration of a mistrial was being considered. By definition, the commission of error is never "manifestly necessary." It could hardly have been reasonably contended that the prosecutor's failure in *Somerville* to scrutinize the indictment prior to the impaneling and swearing of the jury to ensure that it stated an offense under Illinois law was "manifestly necessary."

Neither was the prosecutor's failure in *Lovato* v. *New Mexico*, 242 U.S. 199, to make sure that the defendant had pleaded to the indictment after his demurrer had been overruled an error that could be regarded as "manifestly necessary." Indeed, had application of the Double Jeopardy Clause turned upon the avoidability of errors not chargeable to the defendant, *Somerville, Lovato,* and countless similar cases would have been decided in favor of defense claims of double jeopardy. At bottom, a test such as that employed by the court of appeals in the present case, focusing on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered, sacrifices the public's interest in fair trials ending in just judgments in the name of unattainably error-free trials.[21] The effect of the holding of the court of appeals is that, once the trial judge made the "error" of exclud-

[21] Had the original trials in *Downum* and *Jorn* proceeded to verdict, there is no reason to believe that any resulting judgment of conviction would have been vulnerable to reversal on appeal. In *Downum*, the missing witness was essential to the presentation of the government's case on only two of the six counts in the indictment. In *Jorn*, the court could have granted a short continuance to permit the witnesses to consult with attorneys. The principal defect in the courts' *sua sponte* declarations of mistrials in those cases, then, was the failure adequately to consider alternatives to termination of the trials. The crucial difference in the present case, adopting the court of appeals' conclusion that the trial court erred in excluding Wagner, is that the trial court "could reasonably have concluded" (*Somerville, supra*, 410 U.S. at 459) that any resulting judgment of conviction of respondent in the original trial would have been reversible on appeal.

ing Wagner, respondent was thereafter immune from prosecution for his offense.[22]

Neither do we perceive any substantive distinction, so far as the policies subsumed in the Double Jeopardy Clause are concerned, between what the court of appeals referred to as an error that is "so damaging to the defendant" that he concludes that "he cannot proceed with his case" (Pet. App. 26a) and an unintentional error that carries with it the certainty of reversal on appeal. *Illinois* v. *Somerville, supra,* 410 U.S. at 464. In either case, continuation of the trial, while physically possible, would be a futile and wasteful course of action. And in either case, therefore, the law empowers the trial judge—irrespective of the source of the error—to end the trial on his own motion. Thus, even applying the reasoning of the majority opinions below, what this Court said in *Somerville* has equal application here (410 U.S. at 464):

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

It may be argued that the high price to the ends of public justice placed by the decision below upon errors occurring at trial will encourage trial judges (and prosecutors) to proceed more circumspectly be-

[22] The trial court could have avoided this result only by forcing respondent and the prosecution to go forward with the trial over the objections of both—an alternative that the court of appeals properly regarded as undesirable (see discussion, *supra*, p. 35).

fore acting in ways that make declaration of a mistrial "inevitable." We submit that any such suggestion is unsound and unrealistic. The more likely result of the court's ruling is the manifestly undesirable one noted in one of the dissenting opinions below (Pet. App. 24a):

> The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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JULY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-928

UNITED STATES OF AMERICA,

Petitioner,

v.

NATHAN GEORGE DINITZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-928

UNITED STATES OF AMERICA,

Petitioner,

v.

NATHAN GEORGE DINITZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The initial opinion of the Court of Appeals (Pet. App. A, 1a-25a)[1] is reported at 492 F.2d 53 (5th Cir.

[1] "Pet.App." refers to the Government's petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Other references are as follows: "App." denotes the separately bound appendix. "Pet. brief" refers to the brief for the United States.

1974). The *per curiam* opinion of the Court of Appeals *en banc* (Pet. App. B, 26a-28a) is reported at 504 F.2d 854 (5th Cir. 1974). The opinion of the District Court (Pet. App. D, 31a-37a) is unreported.

The appeal taken February 15, 1973 from the order of the trial judge banishing defendant's trial counsel (5th Cir. No. 731395) was mooted by the subsequent declaration of mistrial. No opinion was filed (App. 38).

JURISDICTION

The judgment of the Court of Appeals *en banc* (Pet. App. C, 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a Writ of Certiorari to and including January 26, 1975, and granted on March 31, 1975 (App. 45). The jurisdiction of this Court rests upon 28 U.S.C. 1254(a).

QUESTIONS PRESENTED

1. WHETHER THE DEFENDANT WAIVED HIS RIGHT TO PROCEED BEFORE THE EMPANELED JURY, AFTER THE TRIAL JUDGE HAD REMOVED THE DEFENDANT'S TRIAL COUNSEL AND THREATENED DISBARMENT AGAINST THE DEFENDANT'S REMAINING COUNSEL IF HE PROCEEDS ALONG THE SAME LINE IN PRESENTING HIS DEFENSE THEORIES.
2. WHETHER, ASSUMING THE DEFENDANT DID WAIVE HIS RIGHT TO PROCEED BEFORE THE EMPANELED JURY, THE IMPROPER ACTIONS OF THE TRIAL JUDGE ALONE CREATED THE NEED FOR SUCH WAIVER.
3. WHETHER A DEFENSE COUNSEL'S PROFFER OF A THEORY OF DEFENSE, MADE OUTSIDE THE PRESENCE OF THE JURY, CONSTITUTES GROUNDS FOR DISBARRING AND BANISHING THAT COUNSEL FROM THE COURTROOM THUS CREATING A MANIFEST NECESSITY FOR A MISTRIAL.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> . . . In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

STATEMENT

The respondent, Nathan George Dinitz, (hereinafter referred to as defendant) was charged with violating 21 U.S.C. § 841(a) and 21 U.S.C. § 846: conspiring to distribute and distributing a schedule 1 controlled substance. On the day of his arrest the defendant retained local counsel, Jeffrey Meldon, Esquire, to conduct his pre-trial defense until he could find an experienced criminal trial lawyer to conduct his trial defense.

Some time before trial was scheduled to begin, Mr. Dinitz retained Maurice Wagner, Esq. to conduct his trial defense. Although Mr. Wagner is a member of the bar of the United States District Court of the Middle District of Florida, and of the Southern District of Florida, (App. 19) he was not a member of the bar of the Northern District of Florida. However, he was admitted by the trial court, and was recognized by the trial court as defendant's trial counsel. (Pet. App. 35a).[2]

On February 14, 1973, a jury was selected and duly impaneled, and the witnesses sworn. On February 15, 1973, trial began. The next day the trial began with a hearing held outside the presence of the jury, on defendant's motion to suppress. (App. 6). During this hearing the Court engaged in its first exchange with Mr.

[2] Also present for defendant were Jeffrey Meldon and Fletcher Baldwin, a professor of law at the University of Florida. Mr. Baldwin advised at the outset of proceedings that he was not a trial attorney and would not participate in the trial.

Wagner by informing him that he would be removed from the courtroom if he continued to present the motion in an argumentative fashion (App. 13). The motion to suppress was denied,[3] and the jury was called into the courtroom. At the conclusion of the Government's opening statement – which included personal opinions and final arguments without rebuke by the trial judge (App. 19) – Mr. Wagner delivered his opening statement. He proceeded without objection until he told the jury that he would call this "the case of the incredible witness" (App. 20). A Government objection to personal opinion was sustained, Mr. Wagner apologized. At that point the jury was removed. (App. 20)

Outside of the presence of the jury, the judge accused Mr. Wagner of baiting the court and issued the second threat of removal (App. 21). The jury was then recalled into the courtroom.

The second time the jury was removed involved a Government objection that Mr. Wagner was presenting a final argument; the jury was promptly removed and the objection immediately sustained. (App. 22) When the jury returned, Mr. Wagner apologized. (App. 22)

The third and final removal of the jury occurred when the Government objected to Mr. Wagner's statement: "some week or ten days later, Nat (Dinitz)

[3] The trial judge was annoyed by Mr. Wagner for submitting many motions, and by the motion to suppress because he considered it frivolous (App. 21). It is noted that a similar motion was presented and considered at length by the Ninth Circuit Court of Appeals, and ultimately denied. *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973).

began to get telephone calls offering ____." (App. 29) The jury was removed, and in absence the court asked Mr. Wagner what he was going to discuss. (App. 29) Mr. Wagner explained that he was going to discuss an extortion attempt against Mr. Dinitz, whereupon the court demanded that he demonstrate proof that the informer, Mr. Cox, was the man who picked up the extortion envelope. (App. 30)[4] Without allowing Mr. Wagner to present his theory as to the relevancy of this information, without allowing him to complete the proffer ordered by the court, and without ruling on the relevancy of the attempted proffer, (App. 30-32) the court expelled Mr. Wagner from the courtroom, stating:

> The Court: You will leave the courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now. Mr. Marshall, see that he leaves the building immediately . . . (Wagner departs). This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination . . . (App. 32-33)

Once Mr. Wagner had been removed, the trial judge turned his attention to Mr. Meldon, the attorney retained to perfect Mr. Dinitz's pre-trial motions questioning Mr. Meldon's complicity in assisting Mr. Wagner's preparations for trial. After the Assistant United States Attorney interjected that Mr. Meldon might well have been aware in advance of Mr. Wagner's

[4]It does not appear that the trial judge considered any evidence or testimony on the matter of the identity of the man who picked up the envelope, prior to banishing Mr. Wagner from the courtroom. (App. 32-33) (Pet. App. 17a-fn. 11).

intended trial tactics, (App. 33) the court then continued to address Mr. Meldon as follows:

> The Court: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently, you called him in to be associated with you. Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner. (App. 34).

Mr. Meldon denied being a party to the preparation and further stated that he was unprepared to try the case. The court proceeded to threaten Meldon with removal – no other disciplinary action was ever discussed – unless Meldon could convince the court that he did not aid Wagner in preparing the opening statement. Meldon continued denying complicity and stated further that he had not been retained to conduct the trial defense, that he was not prepared, and finally that defendant Mr. Dinitz did not want to be represented by him. Although the trial judge would later agree with Mr. Meldon (Pet. App. 31a-37a), he nevertheless ordered Meldon to be ready to proceed the next morning (App. 34-35)

The fact that Mr. Meldon wished to be removed from the case became obvious the next morning when he appeared at an in-chambers hearing from which the defendant was excluded and stated (1) the defendant did not want him, as trial counsel; (2) he was not prepared, and; (3) he *did not want* to try the case (App. 37). Whether intended or not, the court had caused Mr. Meldon to be placed in the untenable position of expressing divided loyalties. Thus, after Wagner was removed, it was apparent even to the court

that Mr. Dinitz was without any counsel able to proceed with an uncompromised defense. (Pet. App. 35A)

During the in-chambers proceeding *after* Mr. Meldon had informed the court that he could not proceed, the court discussed mistrial. "I am seriously considering granting a mistrial because of the fact that the Government nor defendant could get a fair trial." (App. 40) After suggesting the idea for a mistrial, the court recessed the hearing. When the hearing resumed, Mr. Meldon stated that the had spoken to the defendant and, after a full consideration of the situation, desired to move for a mistrial. A mistrial was declared. (App. 42) The Order granting a mistrial stated the following reasons: (1) Mr. Wagner had made improper comments before the jury had prepared to argue that the respondent was the victim of an extortion attempt by the principal government witness (Pet. App. 33a; App. 39); (2) Co-counsel Meldon was unwilling and unprepared to represent the defendant any further (Pet. App. 33a-34a); (3) it appeared from Mr. Meldon's statements that the respondent did not wish Mr. Meldon to further represent him (Pet. App. 34a-35a); (4) the court felt that the respondent might possibly be prejudiced by the absence of his chief counsel (Pet. App. 35a); (5) there was a possibility of adverse publicity concerning the case (App. 40); (6) the forceable removal of Mr. Wagner by the court during his proffer of evidence created a situation where it was a manifest necessity to declare a mistrial (Pet. App. 35a-36a; App. 42).

On February 23, 1973, Mr. Meldon moved to withdraw as counsel for defendant (App. 43). A hearing was held on the motion, (App. 43-44) and the motion

was granted on February 23, 1973. (App. 43) On February 26, 1973, the defendant moved to dismiss the indictment on the ground that denial of his trial counsel placed him twice in jeopardy and therefore precluded retrial. (Defendant's motions for reinstatement of Attorney Maurice Wagner and to Dismiss (App. 2). The defendant alternatively moved to have his counsel, Maurice Wagner, reinstated. (Id.) Both motions were denied, (March 26, 1973 entry, App. 2; Pet. App. 36a) and on April 17, 1973, the defendant, without assistance of counsel was convicted of both counts charged. (April 16, and April 17 entry, App. 2) An appeal notice was timely filed by the defendant (May 15, 1973 entry, App. 2)

Pursuant to the Fifth Circuit Court of Appeals Rule 7, *Fifth Circuit Plan Under the Criminal Justice Act* an attorney, Fletcher N. Baldwin, Jr., was appointed June 11, 1973 to perfect respondent's appeal. A divided panel of the Fifth Circuit Court of Appeals reversed respondent's conviction (Pet. App. A. pp. 1a-25a). After granting the Government's motion for rehearing *en banc*, the full court affirmed the panel's decision (Pet. App. pp. 26a-28a). The position of the majority of the appellate court was that defendant's claim of double jeopardy revolved around two distinct factual issues: first, the threshold issue of whether on the *unique facts* of this case the defendant involuntarily waived his right not to be twice in jeopardy; and, second, if it were not defendant's motion, whether the courts declaration of the mistrial was justified by manifest necessity. With respect to the first issue, the panel held that the actions of the trial judge in banishing defendant's trial counsel and threatening to take similar action against the

remaining co-counsel, coupled with co-counsel's lack of preparation, court's failure to consider alternatives, and defendant's refusal to be represented by co-counsel Meldon, gave defendant no choice but to move for a mistrial. "Under circumstances of this case . . . respondent can hardly be said to have relinquished voluntarily his right to proceed before the first jury." *United States v. Dinitz*, (Pet. App. 13a-14a).

In considering the second issue, the panel pointed out that "usually the declaration of the mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result appellate court normally tests to determine whether the precipitating event created a requisite manifest necessity to abort the trial." (Pet. App. 12A) On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Because the die was cast with the trial judge's response to the conduct of defense counsel, the panel held that appellate review must be focused on Wagner's expulstion rather than on the subsequent declaration of a mistrial. The panel then concluded that means of dealing with Wagner's conduct short of excluding him from the trial had been available to the trial judge, and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, as affirmed *en banc*, (Pet. App. 26a-28a) the action of the trial judge in excluding Wagner, threatening Meldon, and refusing to consider alternatives was an abuse of discretion, and the *sua sponte* mistrial barred renewed prosecution of defendant.

A dissenting member of the panel, and the dissenting members of the *en banc* opinion, rejected as too extreme to be workable, the majority views that the judge's declaration of a mistrial operated to bar defendant's subsequent trial. The dissenting judge determined from the record that the facts showed the motion for mistrial had been voluntarily made, therefore the court should have applied the judicial over-reaching standard and not the abuse of discretion standard.

SUMMARY OF ARGUMENT

The Fifth Amendment protection against double jeopardy is motivated by the desire to avoid subjecting an accused to multiple jeopardy. The mandate of the Fifth Amendment is to insure the reliability of guilt determination.

However, jeopardy may be prevented from attaching where (1) the defendant intelligently waives his right to be tried before a duly empaneled jury, or (2) where the ends of public justice would not be served by strictly adhering to the double jeopardy prohibition. To determine whether the "ends of public justice" exception is operable, this court must conclude from the facts in the instant case that a manifest necessity existed. Otherwise, reprosecution is barred by the command of not placing one twice in jeopardy.

Thus the question presented in this case is whether the trial judge's discharge of defendant's trial counsel was sufficient ground for later dismissal of the jury. In the trial court's opinion the action was proper because:

(A) consent to the mistrial by the defendant waived any Sixth Amendment claim, thus paving the way for a retrial, or if actual consent did not exist (B) a manifest necessity existed whereby the judge on his own motion declared the mistrial.

(A) In determining whether defendant's consent waived his double jeopardy protection, this Court must consider whether the consent was the result of a meaningful choice or whether the "consent" was not consent at all. It is defendant's position that the action of the trial judge in removing defendant's trial attorney during a proffer, and in refusing at any time to consider alternatives to such an extreme act, bars a subsequent trial.

(B) The trial judge in his order concluded that a manifest necessity existed whereby the ends of public justice could not be served unless a mistrial were declared. Neither the facts of this case nor the opinions of this Court support the trial judge's conclusion that a manifest necessity existed.

The trial judge by his own motion violated defendant's right to counsel under the Sixth Amendment and then tried to cure such violation by declaring a mistrial in hopes that such declaration would right the wrong done to defendant. It is defendant's position that judicial error alone rather than the defendant's exercise of any option to stop or go forward, took away his "valued right" to have his trial completed by a particular tribunal. Therefore, the Fifth Circuit Court of Appeals was correct in barring a retrial on the ground that double jeopardy had attached.

ARGUMENT

I.

THE COURT BELOW CORRECTLY CONCLUDED THAT THE ACTIONS OF THE TRIAL JUDGE, TAKEN WITHOUT DEFENDANT'S PROVOCATION OR CONSENT RESULTING IN REMOVAL OF DEFENDANT'S RETAINED TRIAL COUNSEL, PLACED DEFENDANT TWICE IN JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT.

The mistrial declared in this case stemmed directly from the action of the trial judge in disbarring defendant's trial counsel during his Court requested proffer (App. 29). The trial court stated that the action of defendant's trial counsel created a situation which resulted in a manifest necessity to declare a mistrial (Pet. App. 35a). In brief, a mistrial was declared because of the trial judge's concern for possible prejudice arising from Mr. Wagner's opening statement, proffer and ultimate removal. (Pet. App. 33a-35a) The removal of defendant's trial counsel left defendant without effective assistance of counsel of choice, the choice of counsel and trial strategy having been dictated by the trial court. The only remaining retained counsel, Jeffrey Meldon, Esq., pointed out to the court that (1) he was unprepared to go forward (App. 34), (2) he wanted to withdraw from the case (App. 37), and (3) the defendant did not wish him to continue. (App. 37). A mistrial under such conditions placed defendant twice in jeopardy when he was then forced to proceed to a second trial with a newly impaneled jury.

A. Judicial Power to Remove Trial Attorneys After Jury Has Been Impaneled is Not Absolute.

Removal of a trial counsel in a criminal case is an extreme measure and not to be taken lightly. The act of removal leaves an accused at the mercy of the Government; this was especially so in the instant case where all of defendant's funds were exhausted in employing his trial counsel. (App. 43).

When Mr. Wagner, the trial attorney for the defendant, was ordered removed from the trial, the focus of the trial judge was upon the trial defense counsel and not upon the defendant. (The Court: You will leave this courtroom immediately and you will never practice law in this court again Mr. Wagner .... Mr. Marshal see that he leaves the building immediately) (App. 32). The focus should have been upon the protection of the due process rights of the defendant.

The usurpation by a trial judge of the freedom to choose counsel, or the substitution by the court of its judgment for proper avenues of defense, cannot be authorized by the Constitution. The policy against arbitrary control of choice of counsel and choice of strategy and tactics to be taken in defense of the client is necessarily compelling in a criminal case, in view of what a defendant stands to lose should his confrontation with society be unsuccessful.

The scope of a court's discretion with regard to the Sixth Amendment right to counsel must have some limit. A defendant must be afforded a fair opportunity to obtain counsel of choice, and effective use of chosen

counsel cannot be prohibited by arbitrary determinations of proper defense strategy, allowing only that which will not offend the sensibilities of the trial judge. In the instant case, the action of the trial judge in removing trial counsel without considering the alternatives or the consequences, left the defendant penniless and thus at the mercy of the trial court. (R. 82-83) Whether the trial judge had anticipated the impact of his act upon the defendant is not, as the government suggests, the issue. The Constitution anticipated such results and, therefore, requires a greater showing of harm before such an act will be permitted. Indeed, all events flowing from the arbitrary removal had the effect of the trial court substituting its own judgment for that of the defendant. See *Carsey v. United States*, 392 F.2d 810, 813 (D.C. Cir. 1967) (Leventhal, J. Concurring).

The action of the trial court was clearly too drastic, since lesser sanctions were available for controlling the tempo of the trial. Other options included (1) contempt in accordance with 18 U.S.C. § 401(1)[5]; *In re Dellinger*, 461 F.2d 389, 397 (7th Cir. 1972); (2) suspension for a limited period of time, or if it appeared that the court was no longer disinterested and becoming personally embroiled with the trial counsel then perhaps (3) a hearing conducted by a detached judge to determine

[5] It is respectfully suggested that contempt, or the threat of contempt, with its judicial safeguards, would not have disabled Mr. Wagner or Mr. Meldon. But the Damocles sword of disbarment by fiat disabled Meldon from representing the defendant, as completely as the actual disbarment of Wagner by fiat disabled him from representing the defendant in this case.

the gravity of the attorney's conduct. With the implementation of one of these options, the right of the defendant to retain counsel of choice would have been preserved. Cf., *Illinois v. Allen*, 397 U.S. 337 (1970), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In *In re Little*, 404 U.S. 553 (1972) the defendant, representing himself *pro se*, was found in contempt by the trial court. In summation he told the jury that the court was biased and had prejudged his case, and that furthermore, he was a political prisoner. This court reversed the decision and held that the defendant acting as his own counsel should be allowed the same rights that are allowed an attorney before he is convicted of contempt, and since his statements were neither boisterous nor in any way disruptive of the proceedings, he should not have been found in contempt. "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, 153 (1958). See also, *In re Hallinan*, 81 Cal. Rep. 1; 459 P.2d 255 (1969); *Steinberg v. United States*, 162 F.2d 120 (5th Cir. 1947); *In re Dellinger, supra; United States v. Sopher*, 347 F.2d 415 (7th Cir. 1965); *Sprinkle v. Davis*, 111 F.2d 925 (4th Cir. 1940)

The trial court in the instant case ignored the lack of the requisite elements of contempt; so too it ignored its contempt powers by resorting to a far more serious sanction. All statements considered by the trial court to be beyond the bounds of proper trial tactics were presented during proffer and while the jury was out of the courtroom. The alleged courtroom misconduct that the jury was actually exposed to was: MR. WAGNER:

"I call this the Case of the Incredible Witness" (App. 20); and a reference by Mr. Wagner to the fact that the defendant "began to get telephone calls offering —" (App. 29). This served as the basis for Mr. Wagner's removal.

In *Harris v. United States*, 402 F.2d 656 (D.C. Cir. 1968), the court addressed itself to the kind of action the trial judge should take when an attorney makes what the court perceives to be improper comments. In *Harris* the comments were made during closing arguments before the jury, in the instant case the comments were made outside the presence of the jury. The defendant in *Harris* appealed his conviction on the grounds that the prosecutor had made comments to the jury which asserted the prosecutor's personal opinion of the defendant's guilt and that the trial court should have interrupted. The prosecutor stated that defendant's story "reeks of fabrication," "it is a lie," "if you really believe that, he is pulling the wool over your eyes." Besides holding that these statements were insufficient grounds for reversal, the court refused to criticize the trial judge for not interrupting. In footnote one of the opinion the court fully discussed the problem of improper comments by a trial attorney:

> [The] trial judge should not interrupt every argument he thinks undesirable. Here as in other areas there are "gray zones" of argument which, *though they should not be made, do not warrant interruption and would not support a mistrial.* The problem is one of balance; a serious transgression is impermissible, and it is as to these that *intervention* by the trial judge is called for other deviations can be dealt with by the trial judge's post-trial admonition. *Id.* at 657 [emphasis added]

In the instant case, as in *Harris*, the action of defendant's trial attorney was not sufficient to warrant his exclusion during defendant's trial. During his opening statements to the jury, defendant's trial attorney began discussing the case up to the point in time of defendant's arrest, he stated: "Some week or ten days later Nat began to get telephone calls offering –" whereupon the Government objected and the jury was removed. (App. 29). The court asked defendant's attorney what he planned to say next (App. 29). Defendant's trial attorney explained that he was going to mention that an extortion attempt, investigated by the F.B.I., was made on the defendant about a week or ten days after defendant's arrest; that the extortionist claimed he could have the charges against defendant dropped in exchange for $2,000.00 (App. 29-31). With the jury still out the court demanded that Mr. Wagner connect the extortion attempt to the government informer, Mr. Cox, and further stated: "If you cannot convince me this testimony is admissible, you will leave this courthouse today." (App. 31). The "testimony" referred to by the Court was that of the F.B.I. agents who investigated the attempted extortion. Defendant's attorney stated that he had never personally spoken to the F.B.I. agents, but that he did have evidence, (App. 31). The Court asked him where he got the evidence. (App. 31-32). Defendant's attorney replied, "Mr. Meldon, Mr. –" (App. 31-32). The court then inquired of Mr. Meldon as to whether the F.B.I. had revealed to him any connection between the extortion and the Government witness. (App. 32). Mr. Meldon denied having received such information or having conveyed it to Mr. Wagner. (App. 32). On this basis, without

inquiring any further of Mr. Wagner, the Court expelled him from the Courtroom and instructed him not to return. (App. 33). The trial court did not allow Mr. Wagner to continue, and, as the court below noted, the removal seemed related more to a basic misunderstanding between judge and attorney concerning their interpretations of how this material would be relevant, than to concern for what the jury heard or the possible obstruction or taint of the trial. For example: (1) the court's evaluation of the expected testimony of the F.B.I. agents was based entirely on the word of Mr. Meldon, even though Mr. Wagner had begun to mention another name during his proffer. (App. 31) and (2) the action was taken entirely on the trial judge's conception of what Mr. Wagner "intended to say to the jury". The judge could readily have prevented this intention from becoming a reality by admonishing or holding in contempt. As this Court stated in *In re McConnell*, 370 U.S. 230 (1962):

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty . . . .
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous independent bar are both indispensable parts of our system of justice. To preserve the

> kind of trials that our system envisages, Congress has limited the summary of contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice .... *Id.* at 236.

As the Appeals Court noted below, the action by the trial court in removing Mr. Wagner was an abuse of the power of that court. Failure to consider alternatives in order to insure the rights of the defendant resulted in a Hobson's choice of continuing without an experienced trial counsel of choice or aborting the trial; such choice is no choice at all.

B. The prohibition against being placed twice in jeopardy is a Constitutional right and Not a Procedural Rule.

The concept of prohibiting the state from placing one twice in jeopardy evolved from the English common law. 4 W. Blackstone, Commentaries, 335-338; M. Friedland, *Double Jeopardy*, 5-7 (1969); J. Sigler, *Double Jeopardy* 16-21 (1969). In this country the early concept of double jeopardy stressed the fact that a second trial was forbidden, whether the accused had suffered punishment or not. *Ex parte Lange*, 85 U.S. (18 Wall) 163, 168-169 (1874). The prohibition against double jeopardy was an attempt to avoid subjecting a defendant to the gauntlet of multiple prosecutions until a verdict of guilty could be achieved. It was, and is, an attempt to insure the reliability of the guilt determining process. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1274 (1964). See generally, Atlas, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303 (1974) and Comment, *Twice In Jeopardy*, 75 Yale L. Jd. 262 (1965).

The balance between society's interest in convicting criminal deviants and a defendant's interest in being subjected to jeopardy only once was struck in the Fifth Amendment. The question for the early interpreters of the double jeopardy clause was whether the prohibition should be limited, as at common law, to felony prosecutions which had proceeded to final judgment. 4 W Blackstone, Commentaries 335-336. This Court in 1824 rejected such a limit upon twice being placed in jeopardy *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), suggesting that the double jeopardy prohibition might prevent retrial where certain types of activity result in a mistrial. The suggestion in *United States v. Perez* became a constitutional principle in *United States v. Ball*, 163 U.S. 662, (1896) wherein this Court interpreted the double jeopardy clause as a "prohibition ... not against being twice punished, but against being twice put in jeopardy." *Id.* at 669. Furthermore, the clear position of this Court has been and continues to be that jeopardy attaches once the jury has been impaneled and sworn. *Serfass v. United States*, ____ U.S. ____, 95 S. Ct. 1055 (1975). *United States v. Jorn*, 400 U.S. 470, 479 (1971); *Downum v. United States*, 372 U.S. 734 (1963). See also Note, *Double Jeopardy: The Reprosecution Problem, Supra* at 1275-1276. As this Court has noted in numerous cases, the rationale behind jeopardy attaching once the jury has been impaneled and sworn is a concern for the defendant's interest in having his trial completed by one tribunal, not being harassed by repeated prosecutions,

and not being subjected to continuing expense, embarrassment, and anxiety. *United States v. Jorn, supra,* at 479-480; *Downum v. United States,* 372 U.S. 734, 736, (1963) and *Gori v. United States,* 367 U.S. 364, 369 (1961). However, since *Perez,* this Court has also recognized the concomitant interest of the government in achieving just verdicts. See *Wade v. Hunter,* 336 U.S. 684, 689 (1949). Therefore, double jeopardy as a defense will not bar reprosecution in all aborted trials. As this Court noted in *United States v. Perez, supra*:

> We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . but, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office . . . *Id.* at 580.

In the above excerpt from *Perez* Mr. Justice Story rejected a rigid approach to double jeopardy issues. Rather, he articulated a general standard designed to discourage declarations of mistrial. The *Perez* rationale has been approved by this Court ever since 1824.

However, one of the major area of confusion concerns the amount of discretion granted to a trial judge under the doctrine of manifest necessity. (See Argument II, *Infra.*) [Compare *Gori v. United States,* 367 U.S. 364 (1961) *with United States v. Jorn, Supra.*] To avoid such confusion, courts adopted the position that short of a clear showing of manifest necessity, a motion for a mistrial by a defendant will normally be treated as a waiver of a double jeopardy claim. *United States v. Pappas,* 445 F.2d 1194, 1199-1200 (3rd Cir.), *cert. denied,* 404 U.S. 984 (1971).

In this case the Government finds both elements present arguing (1) that the defendant moved, freely and voluntarily for a mistrial and (2) in the alternative, a manifest necessity existed for the judicial declaration of a mistrial (See Argument II, *Infra*). The facts in this case, however, support the conclusion that the declaration of the mistrial was a discretionary act on the part of the trial judge prompted by judicial transgressions far exceeding the bounds of inadvertence. The commission by the trial judge of an avoidable fundamental error followed by little or no evidence of an evaluation by the judge of curative procedures (App. 41) created a situation in which the valued right of the defendant to have his trial completed by a particular tribunal had been usurped by the government acting through its agent, the trial judge. The trial judge in the case at bar ordered defendant's retained and recognized trial counsel (Pet. App. 35a) removed from the courtroom while he was presenting a legitimate argument on behalf of defendant, at the insistence of the trial judge and after the jury had been removed (App. 29). The argument pertained to the admissibility

of certain evidence which the trial counsel was prepared to develop in his opening statement. The proffer that resulted in the removal of Mr. Wagner was not in the presence of the jury (App. 29). Furthermore, the record indicates that at that particular point in time and throughout his brief participation in the trial, defendant's trial counsel was courteous and at no time caused any disruption in the courtroom.

Following the removal of defendant's trial counsel, a motion for mistrial was discussed. The suggestion of mistrial was made by the trial judge (App. 40) to Mr. Meldon, a local attorney hired by the defendant prior to retaining the more experienced trial counsel. Mr. Meldon agreed to submit such motion on behalf of the defendant. It should be noted that although Mr. Meldon appears on the record as an attorney for the Defendant, the record demonstrates that the defendant did not intend to be and was not represented by Mr. Meldon for purposes of the trial. This is clearly shown by statements made by Mr. Meldon and the defendant. Mr. Meldon had not participated in the preparation of the trial. (App. 33-35, 37) The defendant did not wish to be represented by Mr. Meldon: Mr. Meldon indicated that he wished to withdraw from the case. (App. 37-38) The trial court recognized this fact when it noted: "Dinitz was *essentially without counsel* before a jury which possibly had been prejudiced by the inappropriate conduct and the resultant absence of defendant's chief trial counsel." (Pet. App. 35a) (Emphasis added) Yet, the critical decision whether to accept the court's suggestion to move for mistrial was made by Mr. Meldon in-chambers outside the presence of the defendant. Mr. Meldon could not at that point make

such a representation on behalf of the defendant because the defendant had expressed a desire not to be represented by Mr. Meldon (App. 37-39). See, *McKenna v. Ellis*, 28 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

Contrary to the government's argument that defendant could have sought a continuance (Pet. brief 29) at the point of removal of defendant's trial counsel, the court instructed Mr. Meldon to be ready to conduct the defense in less than twenty-four hours. (App. 34-35). This instruction was made after the court had been apprised that Mr. Meldon had not participated in the preparation of the trial. (App. 33-34).

Following the removal of Wagner, the ire and antagonism of the court towards Mr. Wagner was transferred to Mr. Meldon (App. 33-34). The action of the court created such an intimidating influence that Mr. Meldon's concern about representing the interests of the client was then and there in opposition to protecting his own interests in avoiding disbarment by the court. (App. 33). In *Glasser v. United States*, 315 U.S. 60 (1942) this Court stated that a conflict of interests may exist in any situation in which an attorney's decisions in the conduct of the defense are, or may be, influenced by concern for the effect of those decisions on another. He is unable to bring "entire devotion" to the interest of one defendant. In the instant case, Mr. Meldon's decision was influenced, first, by lack of preparation and, second, by the Court's attitude toward him.

In the instant case the defendant was aware of the duplicitous position Mr. Meldon was in. He did not acquiesce or consent to being represented any further

by Mr. Meldon. He did not waive his right to be represented by effective counsel of his choice, The defendant continually tried to get Mr. Wagner reinstated (App. 2, defendant's motions for reinstatement of attorney Maurice Wagner, February 26, 1973).

In the volatile situation that existed at the time the court's attention focused on Mr. Meldon (App. 33-34), he was placed in the uneasy position of not being wanted by the defendant nor being able to devote his full talents as vigorous advocate. This position is particularly evident in counsel's decision to accept the suggestion made by the Court (App. 39-40) and move for mistrial on behalf of the defendant. Mr. Meldon's interest in acquiescing in the suggestions of the trial court was in direct conflict with any interest he may have had in effectively representing the interests of the defendant. *Glasser v. United States, supra.*

The government concedes for argument that "judicial error may have influenced" the decision to move for a mistrial (Pet. brief 24). However, the government urges that any test of "voluntariness" is inappropriate in the context of the instant case (Pet. brief 26). the Government cites for support of this proposition *United States v. Tateo*, 377 U.S. 463 (1964). The government's emphasis on *Tateo* is misplaced. *Tateo* merely extended the rule of *United States v. Ball, Supra,* to include collateral attacks. Thus, after *Tateo* a defendant who attacks his conviction collaterally should be treated the same as one who attacks his conviction directly. The majority of this Court likened *Tateo's* situation to a reversed conviction rather than to the mistrial situation. The government's emphasis upon the defendant's reaction to a potentially prejudicial situation as in

Tateo tends to cloud the true issue here. The issue in the instant case whether the trial judge has unnecessarily deprived the defendant of any opportunity to have his trial completed by a particular tribunal. *Wade v. Hunter, Supra,* at 689. As footnote eleven in *Jorn* points out, the defendant in *Tateo* was not foreclosed from exercising his option of going to the jury of his choice; that option was effectively foreclosed in *Dinitz.*

The option to go forth with a reasonable defense was prevented by the trial judge's action in removing Wagner, and inquiring of Meldon what part he played in preparing the defense theory that resulted in Wagner's removal. (App. 32-33). In point of fact, the trial judge injected his interpretation of the defense theory into the path of defendant; resulting in confusion and removal of the one attorney hired as an expert trial advocate. "Wagner then *intending* to tell the jury of an extortion attempt against defendant which he (Wagner) was *prepared* to argue to the jury involved the government agent . . ." Order of Judge Middlebrooks, (Pet. App. 33a) (Emphasis added). The record is void of any mention of intent on the part of Mr. Wagner to tie in the extortion attempt to the government agent. (App. 31). As the court below noted in footnote eleven:

> It is not at all clear that the discord between the court and Wagner was not the result of a basic misunderstanding. The Court was only concerned with the existence of proof that the undercover agent Cox was the same man who had picked up the bundle left for the extortionist. If the court ever considered that Wagner may have been urging a broader contention – that Dinitz had been set up for the criminal contact with Cox or a

> confederate, to extort funds from him – it is not apparent from the transcript. (Pet. App. 17a)

The granting of a mistrial was improper in that the defendant did not acquiesce in the motion nor was the defendant present at the hearing on the motion. As noted above, the Fifth Amendment right against being twice placed in jeopardy for the same offense is founded upon a defendant's valued right to have his trial completed by a particular tribunal. *United States v. Jorn, Supra.* Thus, a trial court's discretion to declare a mistrial and discharge a duly impaneled jury can only be exercised when there is a manifest necessity to do so. *United States v. Perez, supra.* (See Argument II, *infra.*) or when the defendant validly waives his constitutional right to proceed before a duly impaneled jury. In the instant case, the record does not support the Government's contention that the defendant himself ever waived his right against double jeopardy (Pet. brief 19) (Motion to Dismiss App. 2). The record is silent as to defendant's position on mistrial. The record indicates that the Court never asked the defendant if he desired a mistrial (App. 40-44), although the court was aware that the defendant was present outside of chambers during the in-chamber discussion of a mistrial (App. 40-42).[6] Assuming for argument's sake that a waiver could have cured the fundamental error created by the trial judge, the court was, nevertheless, under a duty to

[6] Respondent has maintained that he had no actual knowledge of the mistrial motion by Meldon. (App. 22, Feb. 26, 1973, Defendant's Motion to Dismiss). The court of appeals specifically did not reach that issue in deciding this case (Pet. App. 12a, Fn. 8), and so, that issue is not discussed in detail herein.

clearly ascertain whether a proper waiver of a constitutional right had occurred, *Johnson v. Zerbst,* 304 U.S. 458 (1938), and

> "a waiver of one's constitutional right cannot be inferred from a silent record, and the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights." *United States v. Aurbach,* 420 F.2d 921, 924 (5th Cir. 1969).

See also *Glasser v. United States, supra,* at 70. To deny defendant his constitutional protections in view of the unique circumstances leading to the in-chambers discussion of mistrial without determining his specific desire is to "condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." *Glasser v. United States, Supra,* at 72, See also *McKissick v. United States,* 379 F.2d 754 (5th Cir. 1967).

What are the unique circumstances that should have alerted the Court to inquire of defendant his position with respect to a waiver of a fundamental constitutional right? *Cf. Drope v. Missouri,* ____ U.S. ____ 95 S. Ct. 896 (1975). First the defendant hired an experienced trial attorney. Second, the record demonstrates that Mr. Meldon, hired in the capacity as "Solicitor," was no longer involved in an aggressive defense once Mr. Wagner was removed. (App. 37-39) Third, the Court was aware that Mr. Meldon no longer wanted to in fact did not represent the best interests of the defendant (Pet. App. 34a-35a). Fourth, the record is silent as to any direct inquiry of defendant to determine his wishes with respect to a mistrial.

On this latter point it is important to note that after Mr. Wagner was excluded, the defendant was forced in

effect, to be his own attorney. This fact, although recognized by the trial court, (Pet. App. 34a-35a) was never taken into account during any of the proceedings following removal of defendant's chief counsel.

The prejudice to the defendant in this case was having retained counsel removed by the court for reasons that cannot overcome the constitutional command of the Sixth Amendment and having that counsel replaced by one who acquiesced in a mistrial when from the record that attorney was unprepared to represent the defendant and the defendant did not want the attorney to represent him. The defendant consistently contended that the mistrial resulted from the court's initial over-extension of its authority in removing counsel Wagner from the courtroom. The in-chambers proceedings resulted in a mistrial to the prejudice of defendant in that he was not represented by an attorney of his choice or an attorney who had the defendant's best interests in mind. This Court has said that the Constitution does not contemplate that the accused shall be dependent for legal assistance upon an attorney with divided loyalties; rather, the Sixth Amendment requires "undivided allegiance and faithful devoted service" *Von Moltke v. Gillies*, 332 U.S. 708, 725-726 (1948); see also *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

As the Circuit Court noted in *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963):

> It has been pointed out that courts indulge every reasonable presumption against waiver of constitutional rights, and that we do not presume acquiescence in the loss of fundamental rights. This protecting duly imposes the serious and weighty responsibility upon the trial judge of

> determining whether there is an intelligent and competent waiver by the accused. *Johnson v. Zerbst*, . . . This means that where the defendant is available, the serious and weighty responsibility of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make an intelligent and competent waiver. *Id.* at 631.

C. Assuming Respondent moved for a mistrial, such motion is immaterial in view of the trial courts prior *sua sponte* act of removing trial counsel.

The standard used to determine the propriety of a mistrial declaration when made on the defendant's own motion was set forth in *United States v. Jorn, supra*:

> Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution; even if defendant's motion is necessitated by prosecutional or judicial error. *Id.* at 486.

However, this Court in *Jorn* did recognize exceptions to the general rule. One exception was noted in footnote twelve wherein this court stated:

> Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. *Id.* at 486.

The Government argues that the exception discussed in *Jorn* is the only circumstance in which judicial error grave enough to necessitate a defendant's mistrial

motion will bar reprosecution (Pet. brief 19-20). If the Government's position were taken literally, it would *first*, require an appellate court to determine conclusively that the error of the judge or prosecutor was motivated solely by a desire to avoid an acquittal. It would not otherwise permit an examination of the seriousness of the error. *Second*, it would ignore judicial or prosecutional vindictiveness or ineptitude. See Jaworski, *Judicial Intimidation: A Threat To The Advocate's Independence*, 1 Litigation 11 (The Journal of the Section of Litigation, American Bar Association) (Winter 1975). The government would permit an inept or vindictive trial judge to subject a defendant to an endless number of retrials so long as the errors involved resulted in defendant's being compelled to submit mistrial motions and as long as a reviewing court could not discover from the record that the trial judge acted out of a clear desire to avoid an acquittal. *Third*, the government's position is contrary to the spirit of *Illinois v. Somerville*, *supra*, in which this court once again rejected the "rigid mechanical" approach to double jeopardy issues. See also, *Serfass v. United States*, ____ U.S. ____, 95 S. Ct. 1055 (1975). *Fourth*, the government's argument ignores the precise language of *Jorn*. There is nothing in *Jorn* to indicate that this court intended to establish an absolute, inflexible rule of law, with the only exception to the rule being mentioned in a footnote. *Jorn* leads to the conclusion that this court was setting forth a general rule as to the circumstances within which a defendant may be reprosecuted. It is submitted that the exception cited in footnote twelve was merely one instance in which the general rule would not control.

> It is also clear that recognition that the defendant can be reprosecuted for the same offense does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. *United States v. Jorn*, *supra* at 484.

It is reasonable to assume, therefore, that this court anticipated situations arising in which the application of the general rule in *Jorn* would work undue hardship on the defendant and consequently would require recognition of exceptions.

The policy reasons for permitting retrial after a defendant moves for a mistrial are especially applicable where a defendant's own gross misconduct is the cause of the mistrial. They are equally applicable in situations in which the defendant's mistrial motion results from relatively minor procedural errors arising during the course of trial. In the latter case, there is no reason for barring retrial because the defendant's ability, procedurally, to conduct his own defense has not been impaired and his choice to abort the first proceeding is a very real one. (Pet. brief 31 n. 19). Retrial is also permitted where the judicial error in question does not substantially increase the risk of defendant's conviction in the first proceeding. *United States v. Tateo*, *supra*. In *Tateo*, the error at issue did not affect the defendant's right to complete his trial before the first jury and possibly be acquitted. Rather, the error related solely to what would happen if the defendant were convicted. In electing to plead guilty in the first trial, the defendant was exercising a very real option. The trial judge's error in *Tateo* did not leave the defendant in a position in which he had no choice but to move for a mistrial.

Accordingly, retrial was permitted because the defendant's guilty plea represented a truly voluntary choice. The error in *Tateo* did not deprive the defendant of any constitutionally-guaranteed right and had no effect upon his procedural ability to proceed before the first jury.

In contrast, where a defendant's motion for mistrial is the direct result of an avoidable, fundamental error committed by the trial judge, the effect of which is to wholly disable the defendant from conducting any defense whatsoever, a very different type of analysis is required. The government, as noted *supra*, contends that all errors committed at trial, other than those involving over-reaching designed to avoid an acquittal, resulting in a defendant's mistrial motion, will not bar reprosecution. (Pet. brief 19)

The major flaw in the government's position is best illustrated by the cases it cites in support of its position. (Pet. brief 31 fn. 19). In *Roberts v. United States*, 477 F.2d 544 (8th Cir. 1973), defendant moved for a mistrial after the trial judge had improperly commented upon the trial tactics of defense counsel. In *United States v. Kwitek*, 467 F.2d, 222 (7th Cir. 1972), defendant's motion for mistrial resulted from a finding that the jury had access to the defendant's criminal record. In *United States ex rel. Montgomery v. Brierly*, 414 F.2d 552 (3d Cir. 1969), improper comment by the prosecutor in his closing statement served as grounds for defendant's mistrial motion. In *United States v. Henderson*, 439 F.2d 531 (D.C. Cir. 1970) defendant's motion was predicated upon a comment by the prosecutor that he planned to rebut the testimony of the defendant by calling the defendant's mother to

testify, then failed to do so. In all of the cases discussed above, reprosecution was held not to be barred by the Double Jeopardy provision of the Fifth Amendment. The government correctly contends that these types of errors, in the absence of prosecutorial or judicial over-reaching, would fall within the general rule articulated in *Jorn*. From this, however, the government argues that if the errors in these cases were not sufficient to bar reprosecution, then *no* trial errors should be held sufficient.

However, there is a clear distinction to consider. The cases cited by the government in support of its position involve prejudice by error. In *Tateo*, for example, defendant had an option open to him, he could have moved for a mistrial or elected to proceed with the first trial in the face of perceived prejudice. Proper court instructions could, in many instances, have saved the first trial from prejudice. The errors complained of in those cases in no way affected the defendant's constitutionally guaranteed procedural right to conduct his defense or present his theory of the case to the chosen first jury through an able trial counsel. In contrast, the case at bar involved an error by the trial judge that goes to the heart of the guilt determining process, an error that had the effect of depriving the defendant of his constitutionally guaranteed right to counsel, an error made without any consideration of alternatives or one defendant's valued right to proceed with his chosen jury, and also his chosen counsel. The error, once made and never reconsidered, placed the defendant in a position in which he had no alternative other than to move for a mistrial The error once made and not recinded could not be cured either by jury

instruction or mistrial. Thus a mistrial motion on the part of defendant is an involuntary reaction to the loss of (1) a constitutional right and (2) a theory of defense aimed at acquittal. The record demonstrates that when the trial judge removed Wagner for beginning a theory of defense thought to be improper by the judge, that theory, i.e. that the defendant had been set up for the criminal contact by someone who planned to extort money from him, (Pet. App. 17a, fn. 11) was foreclosed to any trial attorney following Wagner appearing on behalf of Dinitz (App. 32-33). It is suggested that the action of the trial judge in refusing to consider defense theories as relevant was action taken to avoid the possibility of acquittal, since the only purpose in presenting a theory on behalf of defendant was to get an acquittal. Furthermore, reprosecution is barred by the judicial error of removing Wagner, ignoring at the time of removal the fundamental right of the defendant, thus placing the defendant in a position where his only alternative was to move for a mistrial.

> Research does not disclose any case in which the granting of a mistrial for misconduct of defense counsel has been upheld, although conceivably such action would be proper in case of misconduct going to the very vitals of the trial itself, for example, if the defendant for his counsel attempted to tamper with the jury. Minor misconduct of defense counsel, such as overstepping the limit set by the court for the examination of a witness, does not under the authorities warrant a mistrial thereby depriving the defendant of his right to sesure [sic] a verdict from the jury that had been sworn to try him. *United States v. Whitlow*, 110 F.Supp. 871, 876 (D.D.C. 1953)

In summary, assuming the defendant consented to the mistrial, unless this court is willing to accept the absolute test sought by the government, a different standard of analysis must be applied to judicial errors which relegate the defendant's ability to conduct his own defense. As the court below noted, this standard of analysis flows from *Jorn* and the reference in *Jorn* to judicial errors which do not bar reprosecutions. Judicial errors which do not bar reprosecuting are those which leave the defendant with some reasonable alternative to moving for a mistrial. It is no alternative, as the government would have this court believe, to play off the Fifth Amendment prohibition against double jeopardy with the Sixth Amendment right to counsel. *Simmons v. United States*, 390 U.S. 377 (1968).

The policy considerations allowing retrial are predicated upon the assumption that the defendant was presented with some form of meaningful option involving a selection between more than one reasonable alternative.

The *en banc* court below correctly concluded that the defendant was placed in a position where, because of grave judicial error alone, the only course open to him was to move for a mistrial.

> The judge's action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible. (Pet. App. 26a-27a)

The dicta from *United States v. Jorn, supra,* does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go

forward, took away his valued right to have his trial completed by a particular tribunal. (Pet. App. 27a)

II.

THE COURT BELOW CORRECTLY CONCLUDED THAT A MANIFEST NECESSITY TO DECLARE A MISTRIAL DID NOT EXIST AND THAT JUDICIAL ERROR ALONE TOOK AWAY RESPONDENT'S VALUED RIGHT UNDER THE FIFTH AMENDMENT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL.

As the government notes, a criminal trial is an inherently complex process, vulnerable to human and mechanical influences and failures; neither the defendant nor the Government are entitled to an error-free trial. Thus as *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824) pointed out, if there were no exceptions to the double jeopardy provision of the Fifth Amendment, the burden upon the government to insure a perfect error free trial would be too great. Furthermore, the ends of public justice would not be served by refusing to permit reprosecution when unavoidable events or technicalities result in a trial being aborted. *United States v. Perez, supra; Wade v. Hunter*, 336 U.S. 684 (1949); *Illinois v. Somerville*, 410 U.S. 458 (1973). Since 1824, this Court has articulated an exception to double jeopardy, which recognizes unavoidable circumstances, and recognizes that, if retrial were not permitted, the ends of public justice would not be achieved. The significant focus for the reviewing

court has always been upon the action of a trial judge who aborts a trial prior to verdict. The reviewing court must consider whether, when taking all of the circumstances into consideration, there was a manifest necessity for the decision; that is, the ends of public justice would have otherwise been defeated. *United States v. Perez, supra*, at 580. If a manifest necessity is found to exist, retrial is permitted, and lack of consent on the part of a defendant is immaterial.

Since *Perez*, this Court has had the difficult task of: (1) protecting the intent behind the Fifth Amendment's prohibition against twice being placed in jeopardy and (2) maximizing the trial judge's discretion in order to serve the ends of public justice. Thus, in *Gori v. United States*, 367 U.S. 364 (1961) this Court stressed the maximization of the trial judge's discretion where the declaration of a mistrial was in the sole interest of the defendant. As the majority argued:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment .... Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. *Id* at 369.

In *Gori* the mistrial was declared in order to protect the defendant from supposedly prejudicial evidence. The focus after *Gori* was upon an extension beyond the particular facts of that case. In *Downum v. United States*, 372 U.S. 734 (1963), the prosecuting attorney's request for a mistrial was based upon the absence of a key government witness. *Id.* at 735. The discovery,

after the impanelling of the jury, rendered useless two of the six offenses charged. A motion for a mistrial was granted over defendant's objection. This Court, although declining to establish a specific rule, did examine the facts and conclude that reprosecution could not take place. *Id.* at 738. *Downum* reaffirms this court's position that mistrial must be considered on a case by case basis, and only after viable alternatives have been explored will the reviewing court reach its conclusion as to the correctness of the appealed from action. See also *United States ex rel Russo v. Superior Court of New Jersey* 483 F.2d 7 (3rd Cir. 1973); Note, *Mistrial and Double Jeopardy*, 49 N.Y.U.L.Rev. 937,942-948 (1974). This is precisely what the court below did in the instant case. Viable alternatives were not considered. The trial judge refused to reconsider his order banishing Mr. Wagner and exercise his power of contempt, *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); refused to permit an appeal to consider the propriety of his actions (App. 41); refused to consider a continuance for longer than twenty-four hours (App. 34-35); refused to determine dispassionately whether Mr. Wagner's actions warranted such reaction (App. 41); See *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and *Illinois v. Allen*, 397 U.S. 337 (1970). As the Circuit Court below found, there had been no indication in the record that the trial judge felt that the jury had been prejudiced (Pet. app. 15a).

In *Downum*, the alternatives open to the trial judge were to declare a mistrial, dismiss the two affected counts, proceed with the trial on the other four counts or send the entire case to the jury. There the prosecutor indicated in open court that alternatives to a

mistrial would likely result in total acquittal. *Id.* at 742-743 (Clark, J., dissenting). In *Downum* a mistrial would not benefit the defendant, in fact, it would benefit only the prosecution. Under the circumstances such as in *Downum* this court has been unwilling to extend the solicitous attitude of *Gori* to the government.

In *United States v. Jorn*, relied upon by the court below, this Court adopted a policy of greater appellate scrutiny, noting that an examination into "party benefitting" would not suffice in determining if a retrial would violate the right against double jeopardy. Mr. Justice Harlan indicated that the policies behind double jeopardy cannot be confined solely to prevention of prosecutorial or judicial overreaching." *Id.* at 484. As the lower court in *Dinitz* noted, when, as in *Jorn*, the court *sua sponte* declares a mistrial, the valued right of the defendant to have his cause tried by the first jury has been abridged. *United States v. Dinitz*, (Pet. App. 27a) See also *United States v. Jorn, supra*, at 484.

As the plurality in *Jorn* pointed out:

> The *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. *Id.* at 485.

Thus the command of *Jorn*, that a trial judge consider procedural alternatives to mistrial before it can be said that a trial has been properly aborted, was not met in the instant case. Dissenting in *Jorn*, Mr. Justice Stewart argued that the issue of abuse of discretion should turn upon:

> . . . Whether there (had) been an abuse of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishments of the crime. *Id.* at 492.

In *Jorn*, Mr. Justice Stewart could not find where the defendant had suffered harm, since a mistrial had been declared for the benefit of the witnesses. In the case at bar, however, a valued right of defendant's had been removed by the trial judge: a right to be represented by his experienced, retained trial counsel; a right that goes to the heart of the guilt determining process, see, *e.g. Gideon v. Wainwright*, 372 U.S. 335 (1963).

In *Illinois v. Somerville, supra*, this Court continued its case by case construction of the manifest necessity doctrine. *Somerville* however, differs in that it was a statute proceeding and, although this Court stressed the analysis of manifest necessity, it nevertheless reflected a doctrine of federalism that respects state criminal rules of procedure against federal intervention. *Id.* at 468. Cf. *Huffman v. Pursue*, _____U.S._____, 95 S. Ct. 1200 (1975). The majority in *Somerville* noted that:

> the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementations of that policy in this manner could be manipulated so as to prejudice the defendant. *Id.* at 469.

As to the latter point, the majority, in basing its conclusion upon the fact that Illinois law made it impossible to amend the indictment, found manifest necessity for a mistrial because no curative measure was available. In citing *Wade v. Hunter, supra*, and *United States v. Jorn, supra*, the majority in *Somerville*

supported the *Jorn* concept that requires a trial judge to attempt to find curative procedural alternatives. *Illinois v. Somerville, supra*, at 465-466. *Somerville* holds that a mistrial is proper "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious *procedural* error in the trial." *Id.* at 465. (Emphasis added)

This Court in *Jorn* pointed to the extremes that must be present in order to overcome the defendant's right not to be subjected repeatedly to the ordeal of prosecutions: *United States v. Perez, supra*, (retrial not barred where jurors unable to agree); *Simmons v. United States* 142 U.S. 148 (1892), (retrial not barred where a letter published in a newspaper rendered juror's impartiality doubtful); *Logan v. United States*, 144 U.S. 263 (1892), (retrial not barred where forty hours of deliberation did not result in a verdict); *Thompson v. United States* 155 U.S. 271 (1894), (retrial not barred where jury discharged because one juror had served on the grand jury indicting the defendant); *Wade v. Hunter, supra* (retrial not barred where the military court martial proceedings was discharged due to tactical necessities in the field); and *Gori v. United States, supra*, (retrial not barred where mistrial declared in the sole interest of the defendant.)

The case law from *Perez* to *Somerville* clearly presents the competing policies of "manifest necessity" declarations based upon the ends of public justice, and the rights of defendants to have their cases determined without unnecessary ordeal.

The focus of this court in *Somerville* was upon a mechanical technical failure, and although eschewing

the application of a mechanical formula to be applied in every case, this Court outlined a "general approach" to mistrial double jeopardy cases premised on the "public justice" policy of *Perez* and the cautionary note that:

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *Id.* at 471-472.

The instant case is clearly distinguished from the line of cases culminating in *Somerville*. As the Court of Appeals noted, although the tactics of Mr. Wagner may have been "vexatious": ". . . it certainly cannot be said that, individually or cumulatively, they would have made an impartial verdict impossible." (Pet. App. 15a). Even if the action of defendant's trial counsel could be viewed as intentionally designed to improperly affect the jury, the record below shows the jury *never heard* the remarks of trial counsel termed by the judge "character assasination." At the time of the trial judge's declaration of this mistrial, an impartial verdict was still possible, and, therefore, an unbridled power to banish counsel cannot be supported by the "ends of public justice" policy of *Perez* and *Somerville*.

The second and more variegated line of cases arising from *Perez* fall under the substantive "manifest necessity" doctrine. These cases involve situations where the declaration of a mistrial is based upon a *sua sponte* determination by the trial judge that circumstances have developed at trial which create a "manifest necessity" for mistrial. The "manifest necessity" doctrine is

directed to a broad spectrum of "error", encompassing prosecutorial and judicial error whether intentional or unintentional. Since the improper declaration of a mistrial immunizes the defendant from further prosecution, a *sua sponte* determination by the trial judge should only be reached "in very extraordinary and striking circumstances." *Downum v. United States, supra*, at 736. This court has upheld such findings of manifest necessity for mistrial when the record clearly reflects that the trial judge's determination was not based on a ruling or procedure which would lend itself to prosecutorial manipulation or constitute an abuse of judicial discretion. *United States v. Jorn, supra. Downum* recognized the inherent prejudice in jury discharge and the stringent standards to be applied in assessing the scope of judicial discretion to declare a mistrial based upon the manifest necessity doctrine:

> The discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances," to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is "not against being twice punished but against being twice put in jeopardy." *United States v. Ball*, 163 U.S. 662, 669. *Id.* at 736.

The doctrine of manifest necessity acts as an absolute bar to judicial action which forecloses the defendant's right to proceed to verdict. In *Jorn, supra,* the Court indicated that circumstances may arise in which judicial error or impropriety, not sufficient to constitute over-reaching, *will* nonetheless bar reprosecution – even when the mistrial has in fact been declared at the defendant's request. *Jorn* further amplifies this position:

> But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. *Id.* at 485.

The mere fact of the defendant's mouthing a motion for mistrial does not foreclose inquiry into the defendant's motivation for so acting and, more importantly, does not foreclose the possibility that a second trial may be barred. The application of a mechanical test which would look only to the act and not to the basis upon which it is premised, would fly in the face of this Court's rejection of any mechanistic rigid approach to the mistrial – double jeopardy problem in *Somerville.*

The government contends that the declaration of a mistrial was "manifestly necessary" because the defendant was unwilling to permit his remaining counsel to represent him. (Pet. brief 33). This approach overlooks that the remaining counsel was under threat of disbarment, unprepared to conduct the trial, and not selected by the defendant to act as his *trial* counsel. (See Argument I, *supra*). By focusing on the result, rather than the cause, the government diverts attention from the critical fact: that the trial judge's removal of defendant's trial counsel compelled defendant to proceed without representation and thereby foreclosed him from reasonably or fairly presenting his case to the jury and proceeding to verdict. This is not a case, as is *United States v. Tateo, supra* where *sua sponte* action of the trial judge, although invalidating the defendant's guilty plea, did not deny the defendant the opportunity to proceed to verdict before the empanelled jury. In the

case at bar, the dismissal of defendant's trial counsel foreclosed presentation of his defense to a jury – any jury.

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial. The instant case does not fit this mold. The actions of the court in banishing Wagner and threatening Meldon inexorably led the trial down the path to mistrial. As the government forcefully argues manifest necessity was present when the mistrial was finally granted, but we would be wrong to focus the inquiry there. The die was cast with the trial judge's response to the conduct of defense counsel. (Pet. App. 12a)

The government found this shift of focus, from conditions existent at the time the mistrial was declared to the error itself necessitating the declaration, to be a radical departure from what it termed "the standard evolved by this Court." (Pet. brief. 12-13) Such a position is inappropriate to this Court's recent decisions in *Jorn* and *Somerville.* Furthermore, *Jorn* in particular would belie the government's apparent position that the trial judge's assessment of "manifest necessity" forecloses appellate review of the basis for his determination. The imposition of such a categorical rule of review would act as an effective bar to the detection of prosecutorial or judicial impropriety in all but the most blatant instances. More importantly, the adoption of the government's position would necessitate an overruling of *Jorn*, since this Court recognized in that

decision that the scope of judicial discretion in the declaration of a mistrial *is* subject to strict scrutiny by appellate courts.

In the instant case:

> Since the court's actions at the time of Wagner's banishment made the subsequent grant of a mistrial inevitable, appellate review must center on these actions rather than on the resulting declaration. Dismissal of an attorney in the midst of a criminal trial is not per se wrong. The discretion reposed in the trial court to see that the proceedings before it accord justice to the litigants is, in the abstract, broad enough to encompass such a removal. For example if defense counsel by his actions so prejudices the jury trying his client that manifest necessity exists to declare a mistrial, he may be expelled and a mistrial declared. The fact that the mistrial may be attributed to the absence of counsel is of no moment. Despite such formal characterization, the ultimate cause of the mistrial remains the counsel-provoked jury prejudice. Additionally, it is possible that an attorney's conduct can be so disruptive of the orderly processes of justice as to require his removal from the proceedings and an ensuing mistrial. Again, the manifest necessity for declaring a mistrial would be found in the state of affairs created by counsel before the court takes action. Here our scrutiny must first be directed to the impact on the jury of Wagner's activity at this point to determine if jury prejudice can sustain the ousting of Wagner and the threats of a similar fate for Meldon. (Pet. App. 14a-15a)

Since, as noted above, the jury *never heard* the remarks upon which the trial judge based his expulsion of Wagner, it is evident that it was the action of the

trial judge himself which created the "manifest necessity" for mistrial. Defendant's acquiescence was in no real sense a consensual act since he had no option to continue to verdict.

The Government also contends that there is no distinction between error damaging to the defendant and unintentional error (Pet. brief 38). This conclusion ignores the findings of this Court in *Downum, Jorn* and *Somerville.* It completely fails to distinguish between the type of technical procedural error addressed in *Somerville* and error arising from an abuse of judicial discretion, such as formed the basis for this court's decision in *Downum* and *Jorn.* See, also, *Thomas v. Beasley*, 491 F.2d 507 (6th Cir. 1974); *McNeal v. Hollowell,* 481 F.2d 1145 (5th Cir. 1973); *United States ex rel Russo v. Superior Court of New Jersey,* 483 F.2d 7 (3rd Cir. 1973); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir. 1967); *United States v. Whitlow,* 110 F. Supp. 871 (D.C. 1953); *Espinoza v. District Court,* 506 P.2d 131 (Colo. 1973); *State v. Burruell*, 401 P.2d 733 (Ariz. 1965); *Armentrout v. State,* 15 N.E.2d 363 (Ind. 1938); *State v. Whitman*, 74 P.2d 696 (Utah 1937.)

In *Somerville*, the error noted by the trial court was under State law, incurable, guaranteeing reversal on appeal. As noted earlier, the error in the instant case, assuming Wagner's remarks to have had the most deleterious effect, was wholly curable by the trial judge. Therefore, the actions of the trial judge in response to anticipated misconduct on the part of the defendant's trial counsel "had the effect of rendering Dinitz unable

to conduct his defense."[7] (Pet. App. 13a) The mistrial was the result of the conduct of the trial judge. Since there was no manifest necessity for such a mistrial declaration, the court below was correct in its conclusion that any retrial must be barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution.

CONCLUSION

The Government throughout its argument makes a basic assumption that the mistrial flowed directly from the defense motion. The court below sitting as a panel and then *en banc* disposed of this factual issue by concluding that the defendant was not the cause of the mistrial; rather it was the judge who created the error that resulted in the mistrial. It was the judge who failed to evaluate alternatives to the mistrial and it was the judge who created an atmosphere so adverse to defendant that he could not proceed with his defense.

[7]Hypothetically, the trial judge might, with equal reasonableness, have discharged the jury instead of Mr. Wagner, to prevent the potential of jury prejudice, and given the defendant the option of proceeding before the court without a jury, or consenting to a mistrial. The government could then argue that it is unforeseeable that a defendant would not elect to proceed before the court without a jury. Reversing the appellate decision in the instant case could well vitiate the double jeopardy protection. Whenever a trial judge wished for whatever reason, to end a trial and subject a defendant to multiple prosecutions, he need merely banish counsel, the jury, or both, and then give the defendant an "option" of proceeding or moving for a mistrial.

The assumption made by the Government that the mistrial was a direct result of a defense motion ignores the careful development of the unique facts of the instant case by the court below. As pointed out by that court, sitting *en banc*, the path to mistrial was paved by the actions of the trial judge, not by the respondent or his lead counsel. (Pet. App. 26a-27a) As this Court noted in *Brown v. United States*, 356 U.S. 148, 153 (1958), "Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

The Government has stressed that the defendant in moving for a mistrial waived his Fifth Amendment right not to be placed twice in jeopardy. A waiver, however, is the *voluntary* relinquishment of a known right. It is defendant's contention that the act of Mr. Meldon in moving for a mistrial could hardly be considered voluntary, and since it was by that time clear that the trial could not reasonably continue, the motion did not voluntarily relinquish a known right of the defendant.

The trial court was under a duty to clearly determine whether there had been a proper waiver of the defendant's constitutional right, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Aurbach*, 420 F.2d 921 (5th Cir. 1969); *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), especially since the circumstances leading to the mistrial were created by the court in its unreasonable use of removal powers. The Government fails to recognize that the trial court had options available, short of the drastic act of removal. Any action that would have preserved the integrity of the guilt-determining process should have been followed before taking the drastic action of

removing the trial counsel aborting the trial. The fundamental error of the trial judge could have been cured at any time prior to the actual dismissal of the duly empaneled jury. A motion for a mistrial, bottomed upon explicit threats to the attorney and his client, can hardly be considered a voluntary waiver by the defendant. Indeed, the facts are clear, it was the effect of the trial court's action *sua sponte* that created the point of no return for the defendant.

From the facts the court below correctly concluded that the mistrial was not of defendant's doing, and indeed was the proximate and foreseeable result of the actions of the trial judge with regard to his treatment of Mr. Wagner and Mr. Meldon. Thus the only other possibility opened to the court to save itself from a double jeopardy claim based upon the commission of a fundamental error would have been to consider, as suggested by the Government, whether a *manifest necessity* existed.

In the instant case, the trial court by relying on the "manifest necessity" doctrine in support of its declaration of a mistrial concedes the possibility that the declaration was *sua sponte* and not the result of Mr. Meldon's motion. If the motion for a mistrial was *sua sponte*, the trial court went far beyond the scope of its discretion.

At the time of the removal of Mr. Wagner and the explicit threats to Mr. Meldon, there was no evidence of a manifest necessity to abort the trial. The jury had in no way been influenced by the exchange between the court and Mr. Wagner since, if for no other reason, the jury was *out* of the courtroom most of the time. The alleged misconduct of Wagner precipitating the mistrial

was his *anticipated* statement concerning an extortion attempt made against defendant. The other improper act attributed to Mr. Wagner was the interjection of his opinion before the jury concerning the credibility of a government witness. It should be reemphasized that just prior to that comment the United States attorney had interjected his own opinion as to the guilt of the defendant (App. 19). Mr. Wagner's comment resulted in a strong rebuke by the court, yet the prior personal observation to the jury by the Government passed without comment by the trial judge.

The Government suggests the question: what should the trial judge have done to avoid double jeopardy, once Mr. Wagner had been banished and Mr. Meldon intimidated? It is respectfully suggested that the experienced trial judge should not have reached that road. Once there, the trial judge could still have reinstated Mr. Wagner to conduct the defense.

The government suggests that as a practical matter the relinquishment of the first empaneled jury created very little harm. The double jeopardy provision guarantees the right of a defendant to complete his trial before a particular jury and without the ordeals of time, expense and emotional impact of a second trial balanced against society's interest in the fair administration of justice. *Illinois v. Somerville, supra.* The Fifth Amendment will not permit jury shopping. Furthermore, no societal interest can be served by granting trial judges the unbridled power to summarily remove attorneys from cases for proffering evidence, even if that evidence were ruled inadmissible.

> It has been repeatedly held that, whether the discharge of a jury arose from the arbitrary act of

> the court, or from some mere whim or caprice of judge or jury, or from some accident or blunder, it was immaterial; in either case the result would be the same – the discharge of the defendant. *State v. Turpin*, 54 Or. 367, 103 Pac. 438 (1901).

Furthermore, even assuming that misconduct can be inferred from the record in this case reprosecution of the defendant is nonetheless barred by the double jeopardy provisions of the Fifth Amendment. See *United States v. Whitlow*, 110 F. Supp. 871 (D.D.C. 1953); *State v. Whitman*, 93 Utah 557, 74 P.2d 696 (1937); *Lillard v. Commonwealth*, 267 S.W. 2d 712 (Ky. 1954); *McCabe v. Bronx County Court*, 199 NYS 2d 247 (1960); *Lewis v. State*, 45 2P.2d 892 (Alaska 1969); *Espinoza v. District Court*, 506 P.2d 131 (Col. 1973).

In every case where a mistrial was declared without the consent of the defendant, and reprosecution permitted, the mistrial had been declared because the jury could no longer reach a fair verdict. Where reprosecution has been barred, it has been so because the first jury was dismissed while it was still capable of reaching a fair verdict. In the instant case, it is respectfully urged that the comments of Mr. Wagner which the jury *never heard*, could in no way have prevented that jury from reaching a fair verdict; therefore, reprosecution of the defendant would place him in double jeopardy. Had the court below held otherwise, it would have in effect permitted the trial court to do in two steps what it could not constitutionally do in one. It would in fact have sanctioned the trial court's act of subjecting defendant to multiple reprosecutions, until such time as the

defendant either was represented by counsel approved by the trial judge, or until the defendant retained counsel who would neither make any objectionable comment before the jury, proffer inadmissible evidence, or present a theory of defense that the trial judge disapproved of. As the appeals court below intimated *that cannot be.*

In this case there is not even a suggestion by the trial judge that the original jury would have been unable to reach a just verdict, that a juror was biased, or that there was a real emergency that might necessitate aborting the trial. There is no evidence that the mistrial was necessitated by defendant's abuse of the judicial system, nor that it was declared in the sole interest of defendant, nor that there was any compelling government policy to be implemented by the declaration of a mistrial. Rather, the mistrial was declared because of alleged misconduct by the retained trial defense counsel and his resultant expulsion from the case, leaving the defendant with a Hobson's choice of affirming the court's unconstitutional act or proceeding without counsel. That choice was no choice at all. Thus as the court below held the action of the trial judge rendered defendant unable to conduct his defense and therefore the second trial placed him twice in jeopardy in violation of the Fifth Amendment. It is submitted that the holding of the court below is consistent with the decisions of this Court, especially *United States v. Jorn, supra, Illinois v. Somerville, supra,* and *United States v. Tateo*, 377 U.S. 463 (1964). See also, *United States ex rel Russo v. Superior Court of New Jersey*, 483 F.2d 7 (3rd Cir. 1973). The government has failed to construct a proper foundation upon which to build a case that

would overcome the judgment of the Fifth Circuit Court of Appeals sitting *en banc.*

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

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